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The Austrian Constitutional Court

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A. Introduction

Austrian constitutional adjudication is characterized by a single institution, which in its competences and organizational structure is essentially unchanged compared to the Constitutional Court[1] that was established in 1920. The Constitutional Court is the oldest constitutional court of its kind.[2] At the time of its creation, it was already undergirded by theoretical considerations and concepts. Over the decades, the model of the Austrian Constitutional Court has been adopted by numerous other constitutions.[3] The most important influence the Constitutional Court has exerted is likely

[1] Translator's note: Throughout this text, the term 'Constitutional Court' refers exclusively to the Constitutional Court of the Austrian Republic. Earlier Austrian courts with an analogous function and the analogous courts of other countries are referred to by their original names.

[2] Already in February 1920 did the Czechoslovak constitution establish a specialized constitutional court with the power to review primary and secondary legislation. But it only became operational in November 1921, and after a short time was practically abolished by so-called 'enabling laws'. See Jana Osterkamp, *Verfassungsgerichtsbarkeit in der Tschechoslowakei (1920-1939)* (Vittorio Klostermann Verlag, Frankfurt am Main, 2009) 1, 129 ff.

[3] See Mauro Cappelletti and Theo Ritterspach, 'Die gerichtliche Kontrolle der Verfassungsmäßigkeit der Gesetze in rechtsvergleichender Betrachtung' (1971) 20 Jahrbuch für Öffentliches Recht der Gegenwart N.F. 65 ff.

with regard to judicial review. The establishment and subsequent worldwide dissemination of this type of constitutional adjudication finally helped the model of centralized legal review by an independent court achieve its breakthrough.

In order to understand today's constitutional adjudication, a knowledge of the historical beginnings immediately after the end of the monarchy, at a time when there was no practical experience with a parliamentary democracy as we know it today, is indispensable. In the European comparison, the Austrian Constitutional Court is of great importance in national constitutional practice. It owes this essentially to its power to review and strike down statutes. Until very recently, the Constitutional Court had no authority in disputes between different organs of the state. Only since the beginning of 2015 has it been responsible for ruling on disputes between organs of the *Nationalrat*[4] and organs required to provide information, especially federal ministers, in connection with parliamentary committees of inquiry.[5] The court's authority in disputes in the relationship between the federal organs and those of the *Länder* is also weakly developed from a comparative perspective.

B. Creation and Development

The Austrian model of constitutional adjudication, which establishes an institutionalized, judicial review of abstract, general legal acts, and, in particular, statutes, was first realized in the Federal Constitutional Law (*Bundesverfassungs-Gesetz, B-VG*) of 1920. However, the origins of the idea that the legislature should also be subject to the constitution and thus subject to constitutional control already goes back to the rollback of the 'police state' and its gradual replacement in the course of the nineteenth century with a state based on a constitution and the rule of law. The accompanying introduction of instruments for legal protection and bodies to safeguard the law and the constitution served as the basis for the establishment of the *Deutsch-österreichischer Verfassungsgerichtshof* (Austro-German Constitutional Court) and, finally, for the creation of the Constitutional Court by the *B-VG* of 1920.

1. The Roots of Constitutional Adjudication in the Nineteenth Century

a) General Observations

The idea that all state action should be subject to the law—and the constitution in particular—as well as the formation of individual, public rights, both of which developed in the course of the nineteenth century, raised the question of the institutional possibilities of dispute resolution and law enforcement in public law. Even in the Austrian monarchy, the idea that a judicial review of state action was necessary did

[4] Translator's note: The *Nationalrat* is the popularly elected house of the Austrian parliament.

[5] Art 138b para 1 no 4 and no 6 B-VG in the version contained in Federal Law Gazette (*Bundesgesetzblatt*) I 2014/101.

not arise in a vacuum. It gradually developed in numerous smaller and larger steps, including a few backward steps, until finally coming to fruition in 1920.

In the period before 1848, we can identify at most rudimentary attempts to bind the power of the state to basic rights. In connection with the codification of private law, initial attempts were made to introduce provisions of a basic-rights nature into the legal system. The West Galician Legal Code of 1797, the 'prototype' of the General Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*), includes numerous basic rights in the first and second main sections. Given the natural-law foundation of this codification, a distinction was made here between innate rights and those arising from social life.[6] Subsequently, however, these first beginnings of constitutional awareness were pushed into the background: the *ABGB* of 1811 no longer includes the catalogue of basic rights contained in the West Galician Code; only the mention of the 'innate rights' in section 16 of the *ABGB* was preserved. In the period of absolute monarchy until 1848, the debate on basic rights was largely silenced.[7]

In the period of early constitutionalism from 1848 onward, basic rights and their judicial protection returned to the foreground, but this time without the natural-law aspects that were still characteristic of the private-law codifications.[8] In the Constitution of 25 April 1848 (the so-called 'Pillersdorf Constitution'),[9] we can already find some basic-rights guarantees, but without any provision for their protection by the courts. The constitutional document submitted by the *Reichstag* after its move to Kremsier (Kroměříž) was much more far-reaching, yet it never came into force.[10] In addition to a comprehensive basic-rights section, it also contained an obligation to set up a Supreme Imperial Court (*Oberstes Reichsgericht*). Among other competences, it was to assume three remits still typical of constitutional courts today:[11] The *Reichsgericht* was to decide on 'applications for satisfaction for violations of constitutional rights by official acts of state employees' as well as on more closely defined conflicts of power and charges against ministers.[12] The constitution of 4 March 1849 (the 'imposed March constitution') still provided for the establishment of a supreme imperial court, albeit with a more limited remit, namely, the jurisdiction for alleged violations of political rights.[13] This court was never set up, however.[14]

[6] On the West Galician law code, see, e.g., Rudolf Hoke, *Österreichische und Deutsche Rechtsgeschichte* (2nd edn, Böhlau, Vienna, 1992) 274.

[7] Kurt Heller, *Der Verfassungsgerichtshof: Die Entwicklung der Verfassungsgerichtsbarkeit in Österreich von den Anfängen bis zur Gegenwart* (Verlag Österreich, Vienna, 2010) 85–8.

[8] See Robert Walter, 'Die Funktion der Höchstinstanzen im Rechtsstaat Österreich' (1999) 77 Österreichische Richterzeitung 58, 59; Thomas Olechowski, 'Grundrechte und ihr Schutz in der Habsburgermonarchie' (2010) 88 Österreichische Richterzeitung 30, 31 ff.

[9] *PGS* 49/1848.

[10] The Austrian Federal Government had dissolved the *Reichstag* on 4 March 1849.

[11] Cf Kurt Heller, *Der Verfassungsgerichtshof* (n 7) 89.

[12] Karl G Hugelmann, 'Das österreichische Reichsgericht' (1925) 4 Zeitschrift für öffentliches Recht 458, 459 ff; Friedrich Lehne, 'Rechtsschutz im öffentlichen Recht: Staatsgerichtshof, Reichsgericht, Verwaltungsgerichtshof', in Adam Wandruszka and Peter Urbanitsch (eds), *Die Habsburgermonarchie 1848–1918. Band II: Verwaltung und Rechtswesen* (Verlag der Österreichischen Akademie der Wissenschaften, Vienna, 1975) 663, 674 ff.

[13] Karl G Hugelmann, 'Das österreichische Reichsgericht' (n 12) 462 ff.

[14] Karl G Hugelmann, 'Das österreichische Reichsgericht' (n 12) 463.

The constitutional documents of neo-absolutism no longer provided for any comparable institutions to protect rights.[15] The patent of 26 February 1861[16] established a 'Council of State' (*Staatsrat*), which initially assumed the remit the now-dissolved *Reichsrat* had had before its conversion into a parliament. The Council of State cannot be called a court and is not comparable to the *Reichsgericht*.[17] Even so, the framers held out the possibility that in the future, the Council's jurisdiction could be extended to conflicts of power and disputed matters of public law. Although this never happened, a few years later it was possible to build on this perspective in the final creation of a *Reichsgericht*.[18] After the end of neo-absolutism in 1860, foreign-policy setbacks forced Emperor Franz Joseph to institute internal reforms. The emperor's negotiations for a compromise with Hungary and their political consequences in the *Reichsrat* in 1867 in particular opened up an opportunity for the delegates to demand gradual constitutional reforms in the spirit of German-liberal centralism.[19] The government initially introduced four documents to the House of Representatives (*Abgeordnetenhaus*). One of them was finally adopted as the 'Law of 25 July 1867 on the responsibility of the ministers for the kingdoms and *Länder* represented in the *Reichsrat*'. This led to the establishment of a State Court (*Staatsgerichtshof*) with the power to rule on actions brought by the two houses of the *Reichsrat* against ministers as well as on criminal charges against ministers and their obligation to provide redress.

A sub-committee of the Constitutional Committee then presented its own constitutional documents, which drew inspiration from the constitutional ideas of the year 1849.[20] To establish an Imperial Court (*Reichsgericht*), it combined the demand, which dated from 1848, for an effective court of public law, with the powers of the Council of State under the 1861 constitution, powers which had never become effective.[21] These historical inspirations as well as the role models of legal protection pointed out by the Committee[22] made the establishment of a *Reichsgericht* appear less like a revolutionary act and more like a consistent further development of institutions already considered or tested elsewhere. All this was finally achieved in the 'December Constitution' of 21 December 1867. With this, a 'Basic State Law on the establishment of a *Reichsgericht*' was placed alongside the 'Basic State Law on the General Rights of Citizens for the Kingdoms and *Länder* represented in the *Reichsrat*'. This was intended to make the substantive-rights guarantees enforceable by due process. The Basic Law gave the *Reichsgericht* the power to 'decide on complaints by citizens regarding violations of

[15] Friedrich Lehne, 'Rechtsschutz im öffentlichen Recht: Staatsgerichtshof, Reichsgericht, Verwaltungsgerichtshof' (n 12) 675.

[16] Imperial Law Gazette (*Reichsgesetzblatt*) 22/1861.

[17] Wilhelm Brauneder, *Österreichische Verfassungsgeschichte* (11th edn, Manz, Vienna, 2009) 141.

[18] Karl G Hugelmann, *Das österreichische Reichsgericht* (n 12) 464.

[19] Thomas Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (Manz, Vienna, 1999) 38.

[20] Karl G Hugelmann, *Das österreichische Reichsgericht* (n 12) 464 ff.; Thomas Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (n 19) 39. It bears mentioning that this sub-committee included numerous members of the Constitutional (or German-Liberal) Party, the Frankfurt Parliament, and the Kremsier Diet.

[21] Thomas Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (n 19) 43.

[22] Reprinted in Johann von Spaun, *Das Reichsgericht* (Manz, Vienna, 1904) 26 ff. The report mentions the USA, the Swiss Confederation, and Germany.

their constitutionally guaranteed political rights': the idea of a 'court of basic rights' had become a reality.[23] Thus, as the report of the Constitutional Committee states, a 'gap in the February Constitution' was filled: the Reichsgericht was 'to enforce [the law] precisely where its implementation is threatened by the predominance of administrative influences and considerations of opportunity'.[24]

With the *Reichsgericht* and the *Staatsgerichtshof*, the constitutional monarchy had already created institutions that can be understood as forerunners of the constitutional jurisdiction of the modern kind,[25] even if they lacked any powers to review the law. That two similar judicial institutions with a constitutional function—the *Reichsgericht* and the *Staatsgerichtshof*— worked side by side from 1867 onward can be explained by the way they arose: while the *Staatsgerichtshof* derived from a government initiative, the initiative for the *Reichsgericht* came from the parliament. It was clear from the outset that the *Staatsgerichtshof* was not suited for the enforcement of citizens' rights, which were protected by the *Reichsgericht*.[26] The *Staatsgerichtshof* was focused on asserting ministerial responsibility for violations actually committed; citizens and their rights did not come into its purview. Only the *Reichsgericht* put the emphasis on individuals seeking to uphold their rights, and hence on redressing the violation of these rights.

b) The Reichsgericht *as a Rudimentary Constitutional Court*

The *Staatsgrundgesetz* (State Basic Law, *StGG*) of 21 December 1867 set up a *Reichsgericht* 'to decide on conflicts of responsibility and in disputed matters of public law' (Article 1 *StGG*). The work of the *StGG* was regulated by the Law of 18 April 1869 regarding the organization of the *Reichsgericht*, the procedure it should follow, and the enforcement of its rulings.[27]

The *Reichsgericht* had three major responsibilities. First, it decided on various conflicts of jurisdiction: between judicial and administrative authorities on whether a matter should be settled by legal or administrative means (Article 2(a) *StGG*); between a *Land*[28] representation and a central governmental authority, when each claimed the

[23] Gerald Stourzh, '"Schutz der Verfassung" in der österreichischen Dezemberverfassung von 1867', in Thomas Simon and Johannes Kalwoda (eds), *Schutz der Verfassung. Normen, Institutionen, Höchst- und Verfassungsgerichte* (Duncker & Humblot, Berlin, 2014) 231.

[24] Johann von Spaun, *Das Reichsgericht* (n 22) 25.

[25] If we look more closely, the concept of constitutional adjudication goes back much further. Thus, the 1849 Kremsier Draft, which never came into force, provided for a 'Supreme Imperial Court' (*Oberstes Reichsgericht*) that would decide on petitions for satisfaction alleging that executive action by state servants violated the plaintiff's constitutional rights. The same provision was included in the imposed constitution of March 1849, namely, that there should be a supreme imperial court to intervene in breaches of political rights; but this court was never established, as this constitution never came into force. See Robert Walter, 'Die Funktion der Höchstinstanzen im Rechtsstaat Österreich' (n 8) 58, 59; Thomas Olechowski, 'Grundrechte und ihr Schutz in der Habsburgermonarchie' (n 8) 30, 31 ff.

[26] Johann von Spaun, *Das Reichsgericht* (n 22) 31 ff. Cf also Friedrich Lehne, 'Rechtsschutz im öffentlichen Recht: Staatsgerichtshof, Reichsgericht, Verwaltungsgerichtshof' (n 12) 671.

[27] For more on the organization, powers, and rulings of the *Reichsgericht*, see Thomas Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (n 19) 45 ff.

[28] Translator's note: In Germany and Austria, *Land* (plural *Länder*) is the word used both now and historically for a constituent entity ('state', 'province') of the federation. The *Länder* of the pre-Republican constitutions in both countries are not (necessarily) those of today.

right to act or make decisions in an administrative matter (Article 2(b) *StGG*); between the autonomous organs of different *Länder* in matters assigned to their administration and responsibility (Article 2(c) *StGG*). The *Reichsgericht* had to limit itself to ruling on the issue of competence, 'without touching on the inside of the matter [i.e., the substantive issue]'.[29] The competence of the *Reichsgericht* for the resolution of conflicts of jurisdiction lives on in the form of the competence of the Constitutional Court under Article 138 *B-VG*, which also has a declaratory character.

Second, the *Reichsgericht* ruled on 'claims of individual kingdoms and *Länder* represented in the *Reichsrat* vis-à-vis the totality of the same and vice versa, then on claims of one of these kingdoms and *Länder* against another of them, and finally on claims raised by municipalities, corporations or individual persons against one of the said kingdoms or lands or to the totality thereof, if such claims are not suited to being settled by ordinary legal process' (Article 3(a) *StGG*). The *Reichsgericht* had to declare whether and to what extent the application was granted and within what time any imposed obligation should be fulfilled; the decision had to extend to the matter of costs.[30] This jurisdiction of the *Reichsgericht* had the function to fill gaps in the enforcement of law and thus to complete the field of legal protection. A similar jurisdiction can be found in current Austrian constitutional law in Article 137 *B-VG*. However, the current jurisdiction covers only rulings on property rights claims, whereas the *Reichsgericht* was called upon to decide on public law claims generally.[31]

Third, the *Reichsgericht* was responsible for adjudicating complaints by citizens, after the matter had been reviewed in administrative proceedings, concerning violations of their constitutional political rights (Article 3(b) *StGG*). The *Reichsgericht* had to rule on whether and to what extent the alleged violation of a political right of the complainant had taken place.[32] It is disputed whether the ruling, besides having a declaratory effect, also had the effect of reversing the administrative decision that was the subject of the complaint.[33] The restriction to 'constitutionally guaranteed political rights' delimited the jurisdiction of the *Reichsgericht* from that of the *Verwaltungsgerichtshof* (Administrative Court).[34] According to Article 15 para 2 *StGG*, access to the latter was open to anyone who 'claims to have had his rights infringed by a decision or order of an administrative authority'. This 'division of labour' is still characteristic of Austrian public law.

The *Reichsgericht* was also empowered to review administrative ordinances[35] on a case-by-case basis; however, unlike today's Constitutional Court (see Article 139

[29] Section 33 of the Law of 18 April 1869.
[30] Section 34 of the Law of 18 April 1869.
[31] Thomas Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (n 19) 51.
[32] Section 35 of the Law of 18 April 1869.
[33] For a concurring opinion, see Hans Kelsen, *Österreichisches Staatsrecht* (JCB Mohr, Tübingen, 1923) 66; for a contrary view, see Thomas Olechowski, 'Grundrechte und ihr Schutz in der Habsburgermonarchie' (n 8) 32.
[34] Translator's note: Both now and historically, the highest administrative court in Austria is known as the *Verwaltungsgerichtshof*; a lower administrative court is a *Verwaltungsgericht*. These two words cannot be differentiated in English; throughout this text, therefore, 'Administrative Court' refers to the highest such court, while 'administrative court' (lower case) refers to the lower courts.
[35] Translator's note: The term 'ordinance' is used throughout the text to refer to any administrative act of quasi-legal character (and is often called 'order', 'regulation', 'decree', etc., in English).

B-VG), it had no monopoly in this regard. According to section 30(1) of the Law of 18 April 1869, the *Reichsgericht* could, 'like any other court, be called upon to examine the validity of ordinances and to rule on such validity'. Section 30(2) made clear, however, that it had no competence to 'examine the validity of properly proclaimed laws'. Thus, even though the *Reichsgericht* had no competence to reject formally lawful legislation, as is characteristic of modern constitutional adjudication, it became clear what direction the *Reichsgericht* would take. Before the end of the nineteenth century, scholars, inspired by the institution of the *Reichsgericht* as 'guardian of the constitution', began the preparatory work for the establishment of the later Constitutional Court;[36] at times, the *Reichsgericht* was already being referred to as the '*Verfassungsgerichtshof*' or '*Verfassungsgericht*' ('Constitutional Court').[37] This designation would prove programmatic for the later monopolization of powers to safeguard the constitution, in particular by reviewing legislation, in a specialized court, namely, the Constitutional Court.

c) The Staatsgerichtshof*—A Public Law Jurisdiction on Paper Only*

The origins of the jurisdiction of the Constitutional Court to rule on actions asserting the constitutional responsibility of the supreme federal and *Land* authorities for culpable infringements of rights resulting from the exercise of office (Article 142 *B-VG*) can also be traced back to 1867.

The 'Law of 25 July 1867 on the responsibility of the ministers for the kingdoms and *Länder* represented in the *Reichsrat*' established a *Staatsgerichtshof* that ruled on complaints by the houses of the *Reichsrat* against ministers as well as, as the case may be, on criminal charges against ministers (section 8) and their obligation to provide redress (section 24). Each of the two houses of the *Reichsrat* chose twelve independent citizens with knowledge of the law to serve for a term of six years as members of the *Staatsgerichtshof*. These were not allowed to be members of either house of the *Reichsrat* (section 16). The *Staatsgerichtshof* never issued a ruling.

2. The Austro-German Constitutional Court

On 25 January 1919, the Provisional National Assembly established the Austro-German Constitutional Court (*deutsch-österreichischer Verfassungsgerichtshof*). As the previous functions of the *Reichsgericht* were transferred to the Austro-German Constitutional Court, which thus almost completely replaced the *Reichsgericht*, the latter could be understood as essentially only having changed its name.[38] Admittedly, this Constitutional Court understood itself 'not as a continuation of the former *Reichsgericht* under a different name' but rather as 'a court newly created by the

[36] For an important example, see Georg Jellinek, *Ein Verfassungsgerichtshof für Österreich* (A Hölder, Vienna, 1885).

[37] Gerald Stourzh, '"Schutz der Verfassung" in der österreichischen Dezemberverfassung von 1867' (n 23) 231, 236, 241.

[38] Kurt Heller, *Der Verfassungsgerichtshof* (n 7) paras 149 ff.

Republic of German Austria'.[39] During its short existence, the court at first developed its jurisprudence exclusively with regard to claims by individual persons, in particular civil servants, against the Republic or the *Länder*, which were to be judged especially against the background of the legal succession of the Republic of Austria to the monarchy,[40] and to applications by citizens regarding the violation of the political rights guaranteed by the constitution.[41]

The 'Law of 14 March 1919 on the Representation of the People'[42] finally granted the Austro-German Constitutional Court a rudimentary review jurisdiction, albeit only in respect of *Land* legislation. According to Article 15 of the Law on the Representation of the People, a *Land* government could ask the Constitutional Court to rule on the constitutionality of legislation passed by a *Land* assembly (Article 15(1)). The proclamation of the contested legislation could only take place when the Constitutional Court had recognized its constitutionality (Article 15(2)). The constitutional control was therefore not *ex post* but anticipatory. The power of the Constitutional Court to decide conflicts of jurisdiction was not the only proof that the establishment of constitutional jurisdiction also has its roots in the federal structure of the Republic of Austria: Article 15 of the Law of 14 March 1919 called for mechanisms of orderly rule-of-law dispute settlement between the central state and the constituent states in order to overcome the 'federal execution' and ultimately help prevent a civil war.[43] The 'one-sidedness' of the power to contest *Land* legislation (granted only to the centralized government) expressed the fear that the unity of the state as a whole could be jeopardized above all by unconstitutional legislative intentions on the part of the *Länder*.

3. The Establishment and Early Work of the Constitutional Court under the Federal Constitution of 1920

The current Austrian Constitutional Court came into existence with the Federal Constitution of 1920 and must be seen in close connection with the Viennese school of legal positivism around Hans Kelsen. The theory of the 'hierarchical structure' of the legal order (*Stufenbau der Rechtsordnung*), which goes back to Adolf J Merkl and was incorporated by Hans Kelsen into the theoretical structure of his 'Pure Theory of

[39] *VfSlg.* 6/1919 (*VfSlg. = Sammlung der Erkenntnisse und wichtigsten Beschlüsse des Verfassungsgerichtshofes* or 'Collection of the Decisions and Most Important Orders of the Constitutional Court'). Translator's note: The expression 'Deutschösterreich' (German Austria) was used in the immediate aftermath of the First World War to refer to the 'rump' of German-speaking Austria, which means it did not include Hungary, Bohemia, the Balkan territories of the former Empire, etc. It was almost universally expected, until the Allies forbade it in the Treaty of St Germain, that 'Deutschösterreich' would unite with Germany.

[40] *VfSlg.* 1–4/1919, 7–14/1919, 15–20/1919.

[41] E.g., *VfSlg.* 5/1919 (equality before the law and freedom to choose an occupation), 21/1919 (real-estate transactions), 24/1919 (freedom of movement), 29/1919 (right to choose one's place of residence), 32/1919 (right not to be subject to censorship), and 36/1919 (right to have a case heard before a legally appointed judge). One should emphasize *VfSlg.* 21/1919, where the Constitutional Court examined the lawfulness of an imperial ordinance.

[42] *StGBl.* 179/1919.

[43] Cf Hans Kelsen, 'Die Bundesexekution', in Zaccaria Giacometti and Dietrich Schindler (eds), *Festgabe für Fritz Fleiner* (JCB Mohr, Tübingen, 1927) 127, 156 ff, where Kelsen references the *B-VG* 1920.

Law' (*Reine Rechtslehre*), was determinative for the system of judicial review.[44] Georg Jellinek had still understood the unconstitutionality of a law as a form of conflict of powers between statutory and constitutional legislators, not as a consequence of the hierarchization of the legal system.[45] By contrast, the 'hierarchical structure' theory made self-evident that every constitutional adjudication 'presupposes a clear distinction between constitutional law on the one hand and sub-constitutional law on the other'.[46]

The theory of the 'hierarchy of norms' understands the legal order as an autopoietic system in which the law regulates its own generation. Thus, the legal order is hierarchically structured in accordance with the principle of legal conditionality. This means it depicts a derivative association in which a conditional act flows from a conditioning act. Moreover, the 'hierarchy' assigns different normative force to different legal levels.[47] The conditional association means that legislation can be understood as applying the rules established by the constitution. Legislation, therefore, in the words of Kelsen, is not merely legal production but also legal reproduction, which means it can be tested for lawfulness against higher-ranking law. The enactment, i.e., the 'production' of a statute, has to comply with the rules that the constitution provides for the legislative procedure. In addition, the other, i.e., the material, requirements of the constitution, which limit the permissible content of legislation, must be observed, especially as regards fundamental rights.[48] The 'hierarchical structure' theory thus converts the idea of the legal omnipotence of the legislature into the idea of its constitutional subjugation, paving the way for a judicial review of legislation in the framework of constitutional adjudication.[49]

The 'hierarchical structure' theory thus forms, as it were, the theoretical foundation of Austrian constitutional adjudication. Conversely, the latter is an implementation of the 'hierarchical structure' model.[50] An important element in this context is the doctrine of 'error calculus', which, if a norm is found to be unconstitutional, assumes that the norm is not automatically void but merely voidable. There is, therefore, no derogation whereby a legal act that contradicts a higher-ranking legal act is absolutely void. Rather, unlawful legal acts regularly remain part of the legal order until

[44] Hans Kelsen, *Allgemeine Staatslehre* (Springer, Berlin, 1925) 233 ff.

[45] Georg Jellinek, *Ein Verfassungsgerichtshof für Österreich* (n 36) 20; Thomas Olechowski, 'Grundrechte und ihr Schutz in der Habsburgermonarchie' (n 8) 36.

[46] Ludwig Adamovich, 'Der Verfassungsgerichtshof der Republik Österreich. Geschichte – Gegenwart – Visionen' (1997) 5 Journal für Rechtspolitik 1.

[47] See Christoph Grabenwarter, 'Die Verfassung in der Hierarchie der Rechtsordnung', in Otto Depenheuer and Christoph Grabenwarter (eds), *Verfassungstheorie* (Ferdinand Schöningh, Paderborn, 2010) 393 ff.

[48] Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (1928) 5 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 30, 31 ff. For more on the constitutional rules of lawmaking and fundamental rights as a limitation upon legislative freedom, see Christoph Grabenwarter, 'Die Verfassung in der Hierarchie der Rechtsordnung' (n 47) 400 ff.

[49] Ewald Wiederin, 'Die Stufenbaulehre Adolf Julius Merkls', in Stefan Griller and Heinz P Rill (eds), *Rechtstheorie* (Verlag Österreich, Vienna, 2011) 84.

[50] Christoph Grabenwarter, 'Die Verfassung in der Hierarchie der Rechtsordnung' (n 47) 396 ff; Ewald Wiederin, 'Die Stufenbaulehre Adolf Julius Merkls' (n 49) 83 ff; Christoph Bezemek, 'A Kelsenian Model of Constitutional Adjudication' (2012) 67 Zeitschrift für öffentliches Recht 115, 117.

they are removed from the legal framework by the act of a constitutionally appointed organ.[51] In the conception of the Austrian Federal Constitution, the Constitutional Court is this organ, at least as regards the power to reject abstract-general acts.[52] The Constitutional Court preserves the hierarchical structure of the legal system, which proves to be a step-by-step process of constitutional concretization.[53] Unless a legal act has been overturned by the Constitutional Court (with immediate effect), it remains in force, however unlawful.[54]

The policy and theoretical preparations became evident in various stages of the Court's development.[55] Initially, Hans Kelsen's first constitutional drafts only allowed a federal constitutional court to rule on the constitutionality of *Land* legislation, as had already been envisioned for the Austro-German Constitutional Court by the Law of 14 March 1919 on the Representation of the People. To this the ministerial draft then added the power to decide on the constitutionality of federal statutes.[56] This comprehensive power of judicial review guaranteed the final breakthrough of the typically 'Austrian' constitutional-court system: under the monarchy, after all, the courts had had no right to 'examine the validity of properly promulgated laws'.[57] Although the establishment of the Austro-German Constitutional Court in 1919 provided a first step towards judicial review, this only included the anticipatory review of *Land* statutes (see above, pp 26–7). It was only with the constitutional model created by the federal constitution in 1920 that the concept of legislative immunity to judicial review was completely overcome.

The jurisdiction of the Constitutional Court also included the power to review for constitutionality, on its own initiative, a law it was called upon to apply in a different case. This power laid the foundation for a judicial review mechanism that would not require an application from organs with possibly political motives, and that could be initiated, in principle, by any individual in proceedings under article 144 *B-VG* regarding individual administrative decisions.[58] In fact, the

[51] On this 'Stufenbau nach der invalidatorischen Kraft' see Christoph Grabenwarter, 'Die Verfassung in der Hierarchie der Rechtsordnung' (n 47) 397 ff.

[52] See below, section C.3.b.

[53] Herbert Schambeck, 'Demokratie und Gerichtsbarkeit' (1992) 90 Österreichische Richterzeitung 219, 223.

[54] It is interesting to note how the German *Bundesverfassungsgericht* rejected, in the context of its abstract judicial review of legislation, the Austrian model of the effects of Constitutional Court decisions annulling norms. Cf Wolfgang Löwer, '§ 70 – Zuständigkeiten und Verfahren des Bundesverfassungsgerichts', in Josef Isensee and Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band III: Demokratie – Bundesorgane* (3rd edn, CF Müller, Heidelberg, 2005) 1402, n 885.

[55] For an earlier policy statement that demanded a fusion of the *Reichsgericht* and the *Staatsgerichtshof*, see Karl Renner, *Das Selbstbestimmungsrecht der Nationen: in besonderer Anwendung auf Oesterreich. Erster Teil: Nation und Staat* (Verlag Franz Deuticke, Leipzig, 1918) 292.

[56] On the connection with Kelsen's works, Theo Öhlinger, 'Hans Kelsen – Vater der österreichischen Bundesverfassung?', in Gerald Kohl, Christian Neschwara, and Thomas Simon (eds), *Festschrift für Wilhelm Brauneder zum 65. Geburtstag: Rechtsgeschichte mit internationaler Perspektive* (Manz, Vienna, 2008) 411 ff; Ewald Wiederin, 'Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht', in Thomas Simon and Johannes Kalwoda (eds), *Schutz der Verfassung. Normen, Institutionen, Höchst- und Verfassungsgerichte* (n 23) 289 ff.

[57] Art 7 para 1 StGG on the judicial power of 21 December 1867.

[58] Theo Öhlinger, 'Hans Kelsen – Vater der österreichischen Bundesverfassung?' (n 56) 412 ff.

numerous procedures under article 144 *B-VG* are precisely the ones that provide the Constitutional Court with far-reaching powers of review in all areas of primary and secondary legislation. Since 2015, the *Gesetzesbeschwerde* (the 'objection to a statute'), in which parties to legal proceedings can plead infringement of fundamental rights resulting from the application of an unconstitutional law, fulfils the same function.[59]

After the First World War, the political conditions for the creation of judicial review were favourable. On the one hand, the judicial system was already sophisticated as a result of the monarchy's decision to establish the *Reichsgericht* and the *Verwaltungsgerichtshof* (Administrative Court). On the other hand, there was no democratic tradition in the sense of absolute parliamentary sovereignty that would have been incompatible with the idea of the need to review legislation.[60] On closer examination, however, it is clear that in the course of the drafting of the *B-VG* in 1920, the Constitutional Court's jurisdiction was discussed almost exclusively in terms of the new federal structure of the First Republic: the central authorities understood and demanded that the review authority should be an instrument to supervise *Land* legislation, and they finally secured its establishment in return for granting the *Länder* the reciprocal power to challenge federal laws.[61] The most important political motive for the establishment of the Constitutional Court was thus to establish a unitary organ that was independent from the different territorial entities and whose task it was to supervise compliance with the allocation of legislative powers between the central state and the *Länder*. It was all the more remarkable, therefore, that from the very beginning, the Constitutional Court's powers of judicial review were not limited to this supervision but extended to any form of statutory unconstitutionality, and hence to all areas of the legal system.[62]

The *B-VG* of 1920 also gave the Constitutional Court the exclusive power to review not only statutes but also ordinances. This meant a departure from the 'American system', in which any court could review ordinances, as had existed in Austria under the monarchy. The paradigm shift goes back to Edmund Bernatzik, who worked out the serious consequences of courts diverging on the lawfulness of a certain ordinance and revealed that incidental declarations of unlawfulness lacked binding effect.[63] Bernatzik's work led to the realization that to ensure legal certainty, a general abrogation of unlawful ordinances, binding on all parties involved in legal relations, was

[59] For greater detail, see below, section D.2.

[60] Ewald Wiederin, 'Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht' (n 56) 286 ff.

[61] Theo Öhlinger, 'Die Entstehung und Entfaltung des österreichischen Modells der Verfassungsgerichtsbarkeit', in Bernd-Christian Funk and others (eds), *Der Rechtsstaat vor neuen Herausforderungen: Festschrift für Ludwig Adamovich zum 70. Geburtstag* (Verlag Österreich, Vienna, 2002) 589 ff.

[62] Theo Öhlinger, 'Die Entstehung und Entfaltung des österreichischen Modells der Verfassungsgerichtsbarkeit' (n 61) 591.

[63] Edmund Bernatzik, *Rechtsprechung und materielle Rechtskraft: Verwaltungsrechtliche Studien* (Manz, Vienna, 1886) 290 ff; Ewald Wiederin, 'Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht' (n 56) 298 ff.

indispensable. Article 139 *B-VG* 1920 was a visible expression of this insight and the conclusion of this development.

Monopolizing the jurisdiction to reject unlawful ordinances had repercussions for the introduction of judicial review of statutes, which Bernatzik also wanted to see centralized in a single (judicial) authority. The interests of legal certainty mandated avoiding that courts and administrative authorities had different views on the lawfulness of a statute.[64] This demand would be implemented in article 140 *B-VG* 1920. However, the judicial review of statutes was based not only on the same motivation but also on the same construction as the review of ordinances: just as an unlawful ordinance is binding until its abrogation because a court has reviewed not its validity but only its lawfulness, an unconstitutional law is binding until it is finally struck down by the Constitutional Court following a ruling on its unconstitutionality.[65]

As early as 1925, the competences of the Constitutional Court were partly clarified and partly extended, and the first incompatibility provisions were added to the *B-VG*.[66] The incompatibility of membership of the Constitutional Court with government office, which was already provided for in the law of 1921 that set up the Court and enjoyed constitutional rank,[67] was written into the Constitution. In addition, the president and the vice-president, and eight of the remaining members, as well as for four substitute members, were barred from holding elected office as members of the *Nationalrat, Bundesrat*, or any *Land* assembly.[68]

The rulings handed down until 1929 show that the Constitutional Court acted in most of the areas of its jurisdiction and in some cases made decisions that are still relevant today. The spectrum ranges from cases reviewing statutes and ordinances—they include, for instance, the prohibition of retroactivity and thus a strengthening of the rule of law—to electoral challenges (especially municipal elections) and to two decisions on ministerial charges, which the federal government (led by the Christian Social party) had brought against the Socialist governor of Vienna, Jakob Reumann.[69] Both charges were rejected.[70] During this phase, basic rights did not yet play any role for adjudication.

[64] Edmund Bernatzik, *Rechtsprechung und materielle Rechtskraft* (n 63) 266; Ewald Wiederin, 'Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht' (n 56) 299.

[65] Cf Ewald Wiederin, 'Der österreichische Verfassungsgerichtshof als Schöpfung Hans Kelsens und sein Modellcharakter als eigenständiges Verfassungsgericht' (n 56) 300 ff.

[66] Federal Law Gazette (*Bundesgesetzblatt*) 268/1925. The Constitutional Court was given a new remit in the form of the power to interpret legal provisions relating to the powers of the Court of Auditors (*Rechnungshof*) (arts 126a–c, 127 *B-VG*).

[67] Under Austrian constitutional law, legal provisions may have constitutional rank even if they are not formally incorporated into the document of the Federal Constitution.

[68] Kurt Heller, *Der Verfassungsgerichtshof* (n 7) 198.

[69] The first of these two charges related to the fact that the mayor of Vienna had taken no measures against the premiere of Arthur Schnitzler's drama 'Reigen', whose performance in Austria had been delayed by many years due to its content.

[70] See the survey in Kurt Heller, *Der Verfassungsgerichtshof* (n 7) 208 ff.

4. The Constitutional Court Between 1925 and 1933—The Crisis and Failure of Constitutional Adjudication

The domestic political conflicts that increasingly came to characterize the First Republic also left their mark on the Constitutional Court. Two dates are decisive from a constitutional perspective: the so-called 'de-politicization' of the Constitutional Court in 1929, and its elimination in 1933.

a) The So-Called Depoliticization: A First Attack on the Independence of the Constitutional Court

General political tensions, particularly between Social Democrats and the Christian Social party, led to a comprehensive constitutional amendment in 1929.[71] On the one hand, the amendment adhered to the basic principles of democracy. On the other, it clearly strengthened the executive. In the run-up to the amendment, many increasingly demanded reforming constitutional adjudication; one reason for this was the criticism of some recent rulings of the Court. Especially the ruling of the Constitutional Court on so-called 'dispensation marriages'[72] in particular is likely to have incited allegations on the part of the Christian Social side that the Court was dominated by the Social Democrats.[73] In essence, the criticism was directed against the fact that under the law as it stood, active politicians were allowed to become members of the Constitutional Court, although in reality only very few politicians were members of the Court.[74] There were strident calls for a 'de-politicization' of the court in this sense.[75]

The first steps to enforce this demand were taken with the constitutional amendment of 1929, which introduced a new version of article 147 *B-VG*. It sought to 'de-politicize' the Court by enlarging the role of the executive in appointing the Justices (para 1); strengthening the federalist component (by mandating that individual Justices reside outside of the federal capital of Vienna) (para 2); requiring Justices to be legally qualified (para 3);[76] and, in particular, adding in article 147 para 4 to the previously existing incompatibility provisions of the *VfGG*, which had been incorporated into and extended by the 1925 amendment to the *B-VG*. In addition to members of the federal government or a *Land* government, the following were now excluded from membership of the Constitutional Court: members of a representative body (in particular

[71] Federal Law Gazette (*Bundesgesetzblatt*) 392/1929.

[72] The Constitutional Court had decided that dispensations from the marriage impediment resulting from an existing marriage fell exclusively into the remit of the administrative authorities. Accordingly, the ordinary courts had no power to issue a preliminary ruling on this question. As a result, the individuals who had received a dispensation were able to remarry (*VfSlg.* 878/1927). This removed the legal basis on which the ordinary courts had declares such remarriages invalid.

[73] See Christian Neschwara, 'Hans Kelsen und das Problem der Dispensehen', in Robert Walter, Werner Ogris, and Thomas Olechowski (eds), *Hans Kelsen: Leben – Werk – Wirksamkeit* (Manz, Vienna, 2009) 249 ff.

[74] See above, section B.3. [75] Kurt Heller, *Der Verfassungsgerichtshof* (n 7) 200.

[76] The only member affected by this was Friedrich Austerlitz, who, as a deputy in the *Nationalrat* and editor-in-chief of the *Arbeiterzeitung*, was hit both by the incompatibility provisions and, as the only non-jurist in the history of the Constitutional Court, the requirement of having had a legal training.

members of the *Nationalrat* or the *Länder–und Ständerat,* the former 'upper house' of the national parliament); and employees and other officials of a political party. Finally, an age limit of seventy years was introduced for the Justices who on the basis of the unamended version of the *B-VG* had still been appointed for life. While these provisions in themselves already disqualified some of the sitting Justices, section 25 of the Constitutional Transition Law of 1929[77] shook the independence of the Constitutional Court to its foundations. This section provided for the compulsory resignation of all existing members of the Constitutional Court with effect from 31 January 1930; all the places on the court bench were then to be re-filled.

Given the continued practice of party agreements in the appointment of constitutional Justices, there could be no talk of 'de-politicization'; Adolf J Merkl hit the nail on the head when he coined the term *Umpolitisierung*, or 'repoliticization' (in the sense of 'different politicization').[78] If it is true that this process was aimed in particular at Justice Hans Kelsen and his role in the rulings on 'dispensation marriages',[79] then it was successful. Although the Social Democrats offered Kelsen a reappointment as a politically nominated justice, he rejected this out of hand.[80]

b) The Disempowerment of the Constitutional Court in 1933

After further political conflicts, the simultaneous resignation of all three presidents of the *Nationalrat* in 1933 led to a legal grey zone that the federal government exploited in order to claim that the parliament had *de facto* disempowered itself. Thereafter, the federal government increasingly operated through ordinances based on the War Economy Enabling Law (*Kriegswirtschaftliches Ermächtigungsgesetz*) of 1917,[81] which had been retained in the legislative framework of the Republic. However, for all the divergences of detail, it was clear that this law could in no way be the basis for general governmental legislation.[82] The Constitutional Court was increasingly requested to strike down such ordinances, and the federal government did indeed fear that its ordinances would be set aside by the Court.

By way of an ordinance that also rested on the War Economy Enabling Law,[83] section 6 of the *VfGG* was amended. The members and substitute members of the Constitutional Court appointed on the proposal of the *Nationalrat* or the *Bundesrat* were only allowed to attend and be invited to its sessions and hearings if and for as long as all Justices or substitute Justices appointed on the basis of such proposals were still in office. This meant that if, e.g., a member of the Constitutional Court appointed by the *Nationalrat* resigned from office for whatever reason, none of the remaining

[77] Federal Law Gazette (*Bundesgesetzblatt*) 393/1929.

[78] Adolf Julius Merkl, 'Der "entpolitisierte" Verfassungsgerichtshof' (1930) 23 Der österreichische Volkswirt 509.

[79] Cf, for greater detail, Hans Kelsen, 'Autobiographie', in Matthias Jestaedt (ed), *Hans Kelsen im Selbst zeugnis: Sonderpublikation anlässlich des 125. Geburtstages von Hans Kelsen am 11. Oktober 2006* (Mohr Siebeck, Tübingen, 2006) 31, 71 ff.

[80] Christian Neschwara, 'Hans Kelsen und das Problem der Dispensehen' (n 73) 256.

[81] Imperial Law Gazette (*Reichsgesetzblatt*) 307/1917.

[82] Kurt Heller, *Der Verfassungsgerichtshof* (n 7) 255 ff.

[83] Federal Law Gazette (*Bundesgesetzblatt*) 191/1933 (the so-called 'nomination decree').

members appointed by the *Nationalrat* were allowed to attend and be invited to the Court's sessions and hearings. Thus, as a result of the resignations of members and substitute members soon after, the Constitutional Court no longer reached the quorum it required for its most important proceedings. Although the decimated Constitutional Court decided to review the aforementioned ordinance for lawfulness and to ask the federal president to work towards the restoration of the Constitutional Court, the remaining members of the court no longer constituted the quorum that was necessary for carrying out the procedure. The Court, in other words, was paralysed. The extent to which the Justices might have disregarded the ordinance that deprived it of its ability to function has remained the subject of academic debate to this day.[84] *De facto*, the Constitutional Court gave up the fight in the face of political realities.[85] The Constitution of 1934 then dissolved both the Administrative Court and the Constitutional Court. Their functions were to be united in the *Bundesgerichtshof* (Federal Court) set up in their place. Following the *Anschluss* with Germany and the beginning of National Socialist rule in Austria in 1938, this court was eliminated as well.

C. The Current Legal Design in Context

1. Structural Features of Austrian Constitutional Adjudication

a) A Centralized Jurisdiction with a Monopoly on the Voiding Unconstitutional Legislation

The power to review abstract general legal acts for compliance with superordinate law and to set them aside in case of unlawfulness is concentrated in the Constitutional Court, as we have shown in the above presentation of the Court's historical development. The establishment of an institutionalized constitutional jurisdiction and the allocation of exclusive jurisdiction to set aside legislation following review must be seen in contrast to systems of diffuse review.[86]

According to the model of a centralized constitutional adjudication the *B-VG* sets forth, no other instance acting with the authority of the state has the power to review and, if necessary, set aside properly proclaimed general legal acts on the grounds that they conflict with superordinate law. This does not mean that courts and administrative authorities should not take constitutional requirements into account when seeking a constitutionally compatible interpretation.[87]

[84] Robert Walter, 'Die Ausschaltung des Verfassungsgerichtshofs im Jahre 1933', in Verfassungsgerichtshof der Republik Österreich (ed), *Verfassungstag 1997* (Verlag Österreich, Vienna, 1998) 17; Ewald Wiederin, 'Münchhausen in der Praxis des Staatsrechts', in Clemens Jabloner and others (eds), *Gedenkschrift Robert Walter* (Manz, Vienna, 2013) 865; Markus Vašek, 'Die Gesetzesprüfungskompetenz des VfGH und ihr rechtlicher Schutz' (2015) 137 Juristische Blätter 213.

[85] Thus Kurt Heller, *Der Verfassungsgerichtshof* (n 7) 267.

[86] See, e.g., Bernd Wieser, *Vergleichendes Verfassungsrecht* (Verlag Österreich, Vienna, 2005) 121 ff.

[87] See Lamiss Khakzadeh-Leiler, 'Die verfassungskonforme Interpretation in der Judikatur des VfGH' (2006) 61 Zeitschrift für öffentliches Recht 201.

All courts have the power to approach the Constitutional Court with doubts concerning the lawfulness of ordinances, laws, or international treaties they are called upon to apply. The basic rule-of-law principle of the Austrian Federal Constitution mandates that it must always be possible to raise objections to general legal acts before the Constitutional Court, albeit only as part of an appeal procedure or after exhausting the appeal procedure.[88] This ensures that 'legal acts only appear permanently secure in their legal existence if they have been issued in accordance with the higher-level acts by which they are determined', as the Constitutional Court has expressed it in its standing pronouncements on the rule of law.[89]

The centralization of constitutional adjudication in what is the federal state of Austria is characterized by the fact that the Austrian *Länder*—in contrast to the German *Länder*—do not have their own constitutional jurisdictions. Instead, the Constitutional Court exercises its jurisdiction in respect both of the federation and of the *Länder*.[90] The Constitutional Court is in this sense an organ of the entire state, a *Gesamtstaatsorgan*.[91] This is expressed in the fact that rights guaranteed under *Länder* constitutions also count as 'constitutionally guaranteed rights' and must therefore be upheld by the Constitutional Court.[92] Today, the input of the *Länder* to the Constitutional Court is limited to the power of the *Bundesrat* (which represents the *Länder*) to nominate three members and one substitute member of the Constitutional Court (article 147(2) *B-VG*).

b) Judicial Review by the Constitutional Court: Focussing on Acts of Law

Like almost all of the judicial protections under public law, the Constitutional Court's review is essentially linked to the existence of certain legal acts established by the federal Constitution. From this constitutional concept of legal protection, the Constitutional Court has derived an 'obligation to adhere to legal types',[93] under the terms of which it is constitutionally not permissible to withdraw legal acts from mandatory legal review by issuing them in a legal form other than that for which constitutional law provides. The principle is that 'the public [must] be guaranteed the possibility of seeking review by the Constitutional Court as the final resort for enforcing their constitutional rights' and, consequently, that it is not permissible to suspend the legal protection constitutional law mandates.[94]

Issuing a 'legal source' (i.e., any law, directive, ordinance, etc., with legal effect) that functionally and organizationally blends state and Union law contravenes the constitutional principle of the 'self-contained nature of the system of legal sources'. This is because a legal source generated with the involvement of an organ set up under Union law cannot be understood as an ordinance (*Verordnung*) in the sense

[88] In this sense, for instance, *VfSlg.* 13.223/1992. [89] *VfSlg.* 11.196/1986, 13.223/1992.
[90] Peter Oberndorfer, 'Die Verfassungsrechtsprechung im Rahmen der staatlichen Funktionen' (1988) 15 Europäische Grundrechte-Zeitschrift 193.
[91] I.e., the Constitutional Court as guardian of the Federal and the *Länder* constitutions.
[92] *VfSlg.* 12.472/1990. For greater detail, see Helmut Schreiner, 'Grundrechte und Landesverfassungen' (1999) 54 Zeitschrift für öffentliches Recht 89.
[93] See, for example, *VfSlg.* 17.137/2004. [94] *VfSlg.* 13.223/1992.

of the Austrian federal constitution, which means it is not subject to judicial review by the Constitutional Court.[95] The Court will only consider new legal sources permissible if they not only arise in a democratic context—if, in other words, they are enacted by democratically elected or at least democratically accountable organs—but are also in principle subject to the review, by public-law courts, that the rule of law requires.[96] Ordinances are also unconstitutional if they depart from the strict distinction inherent in the system of legal protection laid down in the *B-VG* between general and individual types of legal acts and, as a result, breach the monopoly of the Constitutional Court to review general legal acts. Thus, a legal provision that grants the power to revoke an ordinance by decree ('mittels Bescheides') is unconstitutional.[97]

c) Ex Post *Review*

Generally speaking, the Constitutional Court can exercise its review function only after the general legal act comes into force, i.e., after its proclamation.[98] This also applies to international treaties, even if, above all in the case of multilateral treaties, there would be problematic consequences under international law if a ratified treaty is declared unconstitutional.[99] The only exception to the principle of *ex post* review lies in the power of the Constitutional Court under article 138 para 2 *B-VG* to rule, upon request of the federal government or a *Land* government, on whether an act of legislation or an executive action lies within the competence of the federation or of the individual *Länder* (see below, p 52).

d) The Abrogation of Unlawful Acts

The Austrian concept of constitutional adjudication is based on the idea that legal acts that contradict superordinate law can only be abrogated with effect *ex nunc*. Therefore, decisions of the Constitutional Court do not merely declare a legal act to be void under the constitution but annul this act with constitutive effect *erga omnes*. In practice, however, there are only minor differences between the abrogation of unconstitutional laws and the declaration that these are void.[100]

[95] *VfSlg.* 17.967/2006. At issue in this ruling was the national allocation plan for emissions certificates, which the Court considered a 'mixed' legal source after considering the legislative process, the legislator, and the legal foundation. In the opinion of the Court, the involvement of the European Commission in the law-making procedure ruled out qualifying the allocation plan as an ordinance ('Verordnung') within the meaning of article 139 of the *B-VG* and thus precluded the possibility of judicial review on this basis.

[96] *VfSlg.* 17.967/2006. [97] *VfSlg.* 18.221/2007. [98] E.g., *VfSlg.* 18.740/2009.

[99] For a different approach, see the German Federal Constitutional Court's decision in, e.g., BVerfGE 123, 267 (329): an act approving an international treaty can, exceptionally, be the subject of a constitutional complaint before the treaty enters into force.

[100] Cf, e.g., Ewald Wiederin, 'Die Gesetzeskraft der Entscheidungen des Bundesverfassungsgerichts', in Peter M Huber, Michael Brenner, and Markus Möstl (eds), *Der Staat des Grundgesetzes – Kontinuität Wandel: Festschrift für Peter Badura* (Mohr Siebeck, Tübingen, 2004) 605, 613 ff.

e) Constitutional Adjudication and the Separation of Powers

In the Austrian system of separated powers, the Constitutional Court is a judicial body that, by virtue of an express order under federal constitutional law, is jointly appointed with the administrative courts to be the 'guarantor of the Constitution and administration'.[101] The Constitutional Court occupies a special position insofar as it alone is required, without being part of an appeals procedure, to ensure and enforce the commitment of the legislature to the Constitution. Only decisions of the Constitutional Court, even if they are not themselves of constitutional status, have priority in any individual case over the action of the legislature.[102] For this reason, the Austrian concept of constitutional adjudication had to confront from the outset the counter-argument that giving the power to strike down laws to a bench of Justices, a body whose democratic legitimacy is merely indirect, contradicts the sole remit of the directly democratically legitimized legislature to give expression to the will of the people (see article 1 *B-VG*), and that political issues are by their essence inaccessible to a decision by a judicial body.[103]

f) The Special Status of Constitutional Adjudication

Against the background of the insight that the actions of the legislature are bound by the Constitution and must be subject to the rule of law, constitutional review is an essential element of the rule-of-law principle of the Austrian federal constitution.[104] To abolish or restrict it would require a vote of the entire electorate, since it would constitute a 'total amendment' to the Constitution within the meaning of article 44 para 3 *B-VG*.[105] Moreover, the fundamental rule-of-law principle also set limits to any 'correction' of the Court's decisions through an act of the constitutional framers (see below, pp 55–6).

[101] Thus the title of the seventh section ('Hauptstück') of the *B-VG*.

[102] Christoph Grabenwarter, 'Die Verfassung in der Hierarchie der Rechtsordnung' (n 47) 406.

[103] See, e.g., Ludwig Adamovich, 'Verfassungsgericht und Parlament' (1997) 119 Juristische Blätter 269, 270 ff.

[104] According to the long-standing jurisprudence of the Constitutional Court 'the spirit of the rule-of-law principle culminates in the concept that all acts of state organs must have their foundation in the law and, indirectly, ultimately in the constitution, and that a system of legal-protection institutions provides a guarantee that only such acts seem permanently secure in their legal existence as were enacted in harmony with the higher-ranking acts that determine them' (*VfSlg*. 11.196/1986).

[105] The safeguarding of existing rights on this scale contrasts with the legal situation in other countries: the prevailing opinion holds that the institution of the German *Bundesverfassungsgericht*––unlike the subordination of the legislature to the constitution––is not covered by the eternity guarantee of art 79 para 3 of the German *Grundgesetz* (cf Michael Sachs, 'Art. 79', in Michael Sachs (ed), *Grundgesetz: Kommentar* (7th edn, CH Beck, Munich, 2014) para 75; Brun-Otto Bryde, 'Art. 79' in Ingo von Münch and Philip Kunig (eds), *Grundgesetz-Kommentar*, vol 2 (6th edn, CH Beck, Munich, 2012) para 48. The contrast with the United Kingdom is even starker, as the UK Supreme Court was set up by statute and its status and existence can likewise be changed by statute. See Jo Eric Khushal Murkens, 'Vereinigtes Königreich', in Armin von Bogdandy, Christoph Grabenwarter, and Peter M Huber, *IPE vol VI* (CF Müller, Heidelberg, 2016) 813.

2. The Organization of the Constitutional Court

a) The Composition of the Constitutional Court and Appointments to its Bench

The Constitutional Court consists of a total of fourteen members: a president, a vice president, twelve other members, and six substitute members (article 147 para 1 *B-VG*). While other systems of constitutional adjudication require no personal or professional qualifications for Justices,[106] the members and substitute members of the Constitutional Court must be graduates in law or political studies and have at least ten years of professional legal experience (article 147 para 3 *B-VG*). In practice, this leads to a mix of all law-related professions. Article 147 para 2 *B-VG* explicitly mentions judges, civil servants, and university professors of a subject related to law; at any rate, the president, the vice-president, six members, and three substitute members must come from this circle. In addition, the Constitutional Court always includes some legal practitioners.[107]

Four bodies are involved in the appointment of the members and substitute members of the Constitutional Court, with the Federal President merely having the power to make appointments on the basis of proposals from the other three. The president, the vice-president, six other members, and three substitute members are appointed by the Federal President on a proposal from the federal government.[108] The remaining six members and three substitute members are appointed by the Federal President on the basis of proposals submitted by the *Nationalrat* for three members and two substitute members, and by the *Bundesrat* for three members and one substitute member.[109] In constitutional reality, the Justices of the Constitutional Court have been and are—with a few exceptions—ultimately proposed by the two long-standing governing parties.[110] Sometimes, owing to certain processes in politically controversial questions,[111] there are accusations of political dependence or at least political connections on the part of Justices. On the whole, however, such criticisms have remained isolated over the last few decades, and have died down fairly quickly, probably not least because rulings provide no objective indications that decisions are motivated by partisan considerations. For this reason, isolated proposals by those involved in legal policy for the 'depoliticization' of the right to appoint Justices have not prevailed.[112]

The independence of the members and substitute members of the Constitutional Court is also ensured in part by rules of incompatibility that are strict by international

[106] See Bernd Wieser, *Vergleichendes Verfassungsrecht* (n 86) 131 ff.

[107] As of 1 January 2015, the bench of the Constitutional Court comprised three professors of public law and a professor of tax law alongside three practising lawyers, a retired judge of the Administrative Court, a retired public prosecutor, and five seconded civil servants.

[108] Art 147 para 2 no 1 *B-VG*. These members and substitute members must be judges, administrative civil servants, or university law-school professors.

[109] Art 147 para 2 no 2 *B-VG*.

[110] Christoph Grabenwarter, 'Verfassungsinterpretation, Verfassungswandel und Rechtsfortbildung', in Hedwig Kopetz (ed), *Soziokultureller Wandel: Phänomene politischer Transformation: Festschrift für Wolfgang Mantl zum 65. Geburtstag* (Böhlau, Vienna, 2004) 61.

[111] For a recent example, see the 'town-sign' decision *VfSlg.* 16.404/2001. For details, see Gert Schernthanner, 'Der Verfassungsgerichtshof und seine Unabhängigkeit' (2003) 58 Österreichische Juristen-Zeitung 621, 622 ff.

[112] Cf Gert Schernthanner, 'Der Verfassungsgerichtshof und seine Unabhängigkeit' (n 111) 624 ff.

standards: the Justices cannot be members of the federal government, a *Land* government, any representative body, or the European Parliament. For members of a representative body or of the European Parliament who have been elected for a specific legislative period or term of office, the incompatibility continues until the end of the legislative period or regular term of office, even if the member concerned resigns prematurely. Also, the Constitutional Court may not include persons who are employees or other officials of a political party (article 147 para 4 *B-VG*). Finally, nobody who has exercised any of these functions in the past five years can be appointed president or vice-president of the Constitutional Court (article 147 para 5 *B-VG*).

b) The Legal Status of the Members of the Constitutional Court

Because the Constitutional Court is a court within the meaning of articles 82 *et seq B-VG*, its members and substitute members enjoy the judicial guarantees of independence, tenure, and non-transferability.[113] Moreover, the Justices are not subject to administrative instructions in internal matters: as the Court has emphasized, the constitutionally prescribed system of review by a public-law jurisdiction allows 'no intervention of any kind whatever on the part of the reviewed body in the affairs of the reviewing body'.[114]

As envisaged by the federal constitution, the Justices are part-time Justices. Only the members appointed from among civil servants are to be released from their regular function. Judges, lawyers, and professors, on the other hand, remain active in their main profession. In practice, however, the Justiceship constitutes the main activity, with the original employment usually taking a back seat. Originally, there were no term limits for Justices at all.[115] Since 1929, the terms end at the end of the year in which a Justice turns seventy.[116] The long term of office leads to a high degree of continuity among the members, which is also reflected in the rulings. It is not unusual for Justices to sit on the bench of the Constitutional Court for two or sometimes even three decades.[117] Occasional suggestions to further limit the term have not led to political discussions on a larger scale.

A premature loss of membership or of the status of substitute member occurs when a member or substitute member fails to comply with three successive summonses to a hearing of the Constitutional Court without sufficient excuse and the Constitutional Court has determined this after hearing his or her evidence (article 147 para 7 *B-VG*). Incidentally, a member or substitute member of the Constitutional Court can be relieved of his office by the Constitutional Court for the reasons listed in section 10 para 1 *VfGG*.[118] In over eighty years, this has never happened.

[113] Art 147 para 6 in conjunction with art 87 para 1 and 2 and art 88 para 2 *B-VG*.
[114] *VfSlg.* 15.762/2000 on s 18 *VwGG*.
[115] Art 147 para 3 *B-VG* in the version contained in Federal Law Gazette (*Bundesgesetzblatt*) 1/1920 ('for life').
[116] Art 147 para 6 (final clause) *B-VG* in the version of Federal Law Gazette (*Bundesgesetzblatt*) 1/1930.
[117] Cf Kurt Heller, *Der Verfassungsgerichtshof* (n 7) 601 ff.
[118] Kurt Heller, 'Die Enthebung eines Mitgliedes des Verfassungsgerichtshofes', in Funk and others (eds), *Der Rechtsstaat vor neuen Herausforderungen* (n 61) 155.

c) The Bench

The Constitutional Court has no divisions or chambers. The unitary bench consists in principle of all the Justices, namely, the president, the vice-president and twelve members, or, to the extent that Justices cannot attend, the corresponding number of substitute members. The quorum is fulfilled if the chairperson and at least eight Justices are present.[119]

Section 7 para 2 *VfGG* provides that in exceptional cases, the quorum may be satisfied by the presence of the chairman and four Justices (known as the *Kleine Besetzung*, or 'small bench'). This includes hearings on matters covered by article 137 *B-VG*[120] and article 138 para 1 no 1 *B-VG*, cases in which the Court sits in private (except for cases under section 10 para 2 and para 4 *VfGG*), and, finally, at the request of the rapporteur, with the agreement of the chairman, in the handling of complaints in cases in which the legal question has already been sufficiently clarified by previous rulings. The Constitution does not expressly provide for this form of decision-making. However, the provision of section 7 para 2 *VfGG* has been declared constitutional by the Constitutional Court.[121]

The deliberations and decisions of the Constitutional Court are concentrated in so-called 'sessions' during which the Court usually deliberates all day, six days a week. The preparation and writing of draft decisions, however, mostly happens outside of these sessions. Overall, hearings take place on around eighty days a year. In urgent cases, especially in electoral matters, additional sessions are scheduled. The 'small bench' is an important means to cope with the workload of the Constitutional Court.

3. The Types of Proceedings and Decisions in Austrian Constitutional Adjudication

The Austrian Constitutional Court can be seen as a type of 'isolated constitutional jurisdiction', that is, as a constitutional jurisdiction whose function was originally confined to reviewing general and abstract norms and did not include constitutional complaints against court judgments. The decisions of the private-law and criminal courts are not subject to any review by the Constitutional Court apart from the new 'objection to a statute' (see below, p 47, p 57). The decisions of the Administrative Court are also not subject to constitutional review. Apart from the exclusive power to review general norms, however, the Constitutional Court has powers that go far beyond a constitutional court's typical core task of reviewing statutes for constitutionality.

Conversely, the Constitutional Court lacks powers that are otherwise typical of constitutional courts, notably the power to decide on the prohibition of political parties.[122] As a remarkable exception to the system of centralized constitutional jurisdiction in Austria, all courts and administrative authorities—including, if necessary, the Constitutional Court itself—have the power to assess on a case-by-case basis whether the statutory activity of a political association is compatible with the Constitution

[119] Section 7(1) *VfGG*.
[120] For more details, see below, section C.3.a.i.
[121] *VfSlg.* 16.650/2002.
[122] See Bernd Wieser, *Vergleichendes Verfassungsrecht* (n 86) 145.

and whether the association has thus acquired the status of 'legal person' by filing its statutes with the Federal Minister of the Interior under the terms of section 1 para 4 of the Political Parties Act.[123] A centralized procedure to prohibit parties, as exists in Germany, has obviously been considered a too far-reaching interference with the freedom to found a party.

a) Cross-Cutting Elements

i. The course of constitutional proceedings

In principle, the Constitutional Court is a court that adjudicates litigation between parties and is thus bound by procedural law.[124] There is, however, no single Constitutional Court procedure. Rather, the procedure emerges from a combination of procedural rules laid down by various laws.[125] Starting from the basic provisions of the Constitution, the procedure of the Constitutional Court is primarily regulated by the Constitutional Court Law (*Verfassungsgerichtshofgesetz, VfGG*).[126] The *VfGG*, in turn, sets forth that the procedure laid down in the Code of Civil Procedure (*Zivilprozessordnung*) shall be applied as long as the *VfGG* stipulates nothing to the contrary.[127] This means that the Constitutional Court procedure is adversarial and determined by the principle that the parties present the evidence.

Applications to the Constitutional Court must be made in writing and include a reference to the article of the *B-VG* pursuant to which the court action is initiated, a presentation of the facts on which the application is based, and a statement of desired outcome.[128]

The case must be submitted through counsel.[129] The reason for this is the requirement that submissions provide a formally and substantively appropriate basis for the Court to initiate the proceedings. This system is in conformity with the constitution,[130] as legal aid is available in most of the proceedings.[131] In the subsequent course of the action, notably during hearings before the court, parties may represent themselves, but if they choose to be represented by anyone else, it must be a lawyer.[132] Federal institutions, the *Länder*, municipalities and associations of municipalities, foundations, funds, and institutions administered by the organs of these bodies or by persons or groups of persons appointed by them, and other self-governing bodies and their authorities are represented by organs appointed or competent to represent them.[133]

[123] *VfSlg.* 9648/1983, 11.258/1987.

[124] Michael Holoubek, 'Grundsätze des verfassungsgerichtlichen Verfahrens', in Michael Holoubek and Michael Lang (eds), *Das verfassungsgerichtliche Verfahren in Steuersachen* (Linde, Vienna, 2010) 429, 432 ff, 440.

[125] Michael Holoubek, 'Grundsätze des verfassungsgerichtlichen Verfahrens' (n 124) 439.

[126] Cf the second part of the *VfGG* (ss 15 ff.): 'Verfahren vor dem Verfassungsgerichtshof' ('Constitutional Court Procedure'). In addition, the standing orders of the Constitutional Court (Federal Law Gazette [*Bundesgesetzblatt*] 202/1946) also include procedural rules.

[127] Cf s 35 para 1 *VfGG*. [128] Section 15 *VfGG*. [129] Section 17 para 2 *VfGG*.

[130] *VfSlg.* 7564/1975, 7756/1976.

[131] Section 35 para 1 *VfGG* in conjunction with ss 63 *et seq.* ZPO.

[132] Section 24 para 1 *VfGG*.

[133] Section 24 para 2 *VfGG*. The following subsection, para 3, additionally permits representation by the Financial Procurator (*Finanzprokuratur*) or by organs of the federal ministries.

The Court appoints certain Justices from among its members to act as standing rapporteurs.[134] The president allocates each incoming case to one of these rapporteurs.[135] If a decision in favour of the applicant is not inconceivable *a priori*, the rapporteur initiates a preliminary procedure in which the application is submitted and the relevant authority has the chance to state its case;[136] at the same time, statements can be obtained from any other parties involved. The rapporteur may also demand the hearing of the parties, of witnesses, experts, and other individuals with relevant information, a visual inspection, the submission of documents or official files, and information from administrative authorities.[137] To this extent, the Constitutional Court has powers to investigate the facts of the case; in practice, however, this does not happen very often, as evidence is usually presented by the parties themselves. Furthermore, without obtaining a decision of the court, the rapporteur decides procedural matters in the preliminary proceedings as well as measures that serve to prepare a hearing in court.[138] Finally, she will submit a written draft decision.

The principle that findings of the Constitutional Court are based on a public oral hearing is broken by numerous exceptions. Thus, without a hearing, the court can reject to admit a complaint pursuant to article 144 para 2 *B-VG*, reject an application on the grounds that procedural requirements have not been met, or terminate the proceedings if the application is withdrawn or the cause of action disappears as a result of voluntary satisfaction. Furthermore, the Constitutional Court can dispense with oral proceedings if the written evidence presented by the parties and the files submitted to the Court indicate that oral debate would not further the argument. Finally, the following may be decided in closed session without oral proceedings, at the request of the rapporteur: the dismissal of an application where a constitutionally guaranteed right has manifestly not been violated; cases in which previous decisions of the Constitutional Court have already sufficiently clarified the question of law; and a ruling in favour of the applicant that has occasioned the annulment of an unlawful ordinance or of an unlawful re-promulgation (*Kundmachung über die Wiederverlautbarung*) of a law or a state treaty (i.e., any treaty to which a state organ is a party), of an unconstitutional law, or of an illegal state treaty.[139] These far-reaching exceptions make public oral proceedings before the Constitutional Court rare in practice. On average, only about ten such hearings take place each year.

Nor has the Court abandoned this practice in the light of recent decisions of the European Court of Human Rights (ECtHR). In the *Kugler* case, the ECtHR did indeed state that the Constitutional Court should have held an oral hearing in a case in which concerns had been raised over the legality of a zoning plan.[140] The Constitutional Court, on the other hand, considers that the absence of oral proceedings is still

[134] Section 2 para 1 *VfGG*. Currently, eleven of the twelve Justices of the Constitutional Court are standing rapporteurs. The vice-president, but not the president, also acts as rapporteur in certain matters.

[135] Section 16 *VfGG*.

[136] In the procedure governed by art 144 para 1 *B-VG*, the administrative court is the relevant authority. See the Court's preliminary legal analysis in the order of 11 March 2014, B 40/2014.

[137] Section 20 para 2 *VfGG*.

[138] Section 20 para 1 *VfGG*.

[139] For details, see s 19 *VfGG*.

[140] *Kugler v Austria*, no 65631/01, 14 October 2010, paras 43 ff.

compatible with article 6 of the ECHR, given the particularities of the case in question, the submissions of the applicant, and the possibilities of participation in the procedure for adopting the zoning plan.[141]

If an oral hearing does take place, the Justices, if possible, decide the case immediately after the hearing concludes, and subsequently announce the ruling, including the essential reasons. Otherwise, the ruling is either announced orally on a particular date that is immediately communicated to the parties after the hearing concludes, or, at the discretion of the Court, made known to them in writing. The latter is the rule in practice, since it is almost impossible for the Justices to reach a decision immediately after a hearing.

The Constitutional Court adjudicates the case by decision (*Erkenntnis*) if it rules on the merits; if it does not, it decides by order (*Beschluss*). It decides by a simple majority of votes. The chairperson does not vote, unless the other Justices are equally divided, in which case he or she has the casting vote. Unanimity is required for orders that reject dealing with applications against the decision of an administrative court (see article 144 para 2 *B-VG*) or reject an application on the grounds that a constitutionally guaranteed right has manifestly not been breached.[142]

How many Justices voted for or against a decision is not made public.[143] There is no provision for the publication of dissenting or concurring opinions. There is no longer any intense debate in legal circles as to whether dissenting or concurring opinions should be made public.[144]

Decisions of the Constitutional Court are executable under the terms of article 146 *B-VG*. Decisions pursuant to article 126a, article 127c para 1, and article 137 *B-VG* are executed by the ordinary courts (article 146 para 1 *B-VG*). Other decisions are executed by the Federal President acting on the request of the Constitutional Court. Depending on the President's instructions, execution is carried out by the organs of the federation or of the *Länder*, including the army, at his or her discretion (article 146 para 2 *B-VG*). In practice, the possibility of (forcibly) executing Constitutional Court decisions is almost never used.[145] The decisions of the Constitutional Court are usually obeyed without further ado (see below, p 55, p 59).

ii. The ruling: The theoretical influences and the style of reasoning

The judicature of the Constitutional Court is characterized by the theoretical conception of the Viennese school of legal positivism (see above, pp 27–8). This corresponds to a style of judgment that is much more restrained compared to that

[141] *VfSlg.* 19.587/2011.

[142] Section 19 para 3 no 1 in conjunction with s 31 (final clause) *VfGG*.

[143] Cf s 30 para 1 *VfGG*.

[144] There was a parliamentary inquiry into this matter in 1998, with some of the contributions and declarations engaging in legal comparison (see [1999] 32 Journal für Rechtspolitik 1 ff). See, e.g., Jutta Limbach, 'Das Bundesverfassungsgericht und das Sondervotum – Einführung des Minderheitsvotums am Verfassungsgerichtshof' (1999) 32 Journal für Rechtspolitik 10 ff. Cf also Gert Schernthanner, 'Der Verfassungsgerichtshof und seine Unabhängigkeit' (n 111) 625 ff.

[145] Practically the only decisions that are thus enforced relate to the recovery of costs (Andrea Martin and Michael Rohregger, 'Art. 146 B-VG', in Karl Korinek and Michael Holoubek [eds], *Österreichisches Bundesverfassungsrecht* [1st delivery, Verlag Österreich, Vienna, 1999] para 3).

of the German constitutional court, the *Bundesverfassungsgericht*. For example, the Constitutional Court does not offer general observations that span several pages and from which the Court deduces considerations for deciding the case at hand. There is also some restraint in quoting scholarship.[146] However, we do find in the jurisprudence so-called 'fundamental-rights formulas' (*Grundrechtsformeln*),[147] which are received by legal practice and in university legal training and have the function of so-called 'intermediate formulas' in the implementation and subsumption of certain facts under the elements of the rule in question.[148] Some of these formulas are summarized in an internal 'formula collection' and are mostly incorporated into the judgment without change.[149]

The reasons for judgments are narrower than those of other constitutional courts, and the style of reasoning is less discursive than that of the ECtHR, although in the last ten years there has been a development towards more detailed judgments. As with many constitutional courts, deriving certain general requirements and principles lies at the heart of most judgments. Relevant—possibly foreign—literature is also cited, but to a relatively minor extent.

Although the Constitutional Court has explicitly rejected directly considering the contents of a foreign constitution in its judgments,[150] it still occasionally draws inspiration notably from foreign constitutional doctrine. However, any identified influences from foreign public law are particular rather than general; thus, repeated reference is made to the German literature. Mention should be made, for example, of decisions regarding the freedom of occupation, which implicitly refers to the tiered doctrine of article 12 of the German Basic Law (*Grundgesetz*).[151] The Constitutional Court occasionally backs up its judgments by referring to decisions of Germany's *Bundesverfassungsgericht*, above all in judgments on human rights,[152] but also in cases involving the law of church–state relations.[153] Otherwise, comparative constitutionalism does not play a major role in the decisions of the Constitutional Court,[154] which always keeps its distance from the results of interpretations reached on the basis of

[146] See also Kurt Heller, *Der Verfassungsgerichtshof* (n 7) 400 ff.

[147] The Constitutional Court uses a 'basic-rights formula' to paraphrase the preconditions on which it assumes the violation of a constitutionally guaranteed right by an act of legal enforcement. Cf Karl Spielbüchler, 'Grundrecht und Grundrechtsformel', in Oswin Martinek (ed), *Arbeitsrecht und soziale Grundrechte. Festschrift for Hans Floretta* (Manz, Vienna, 1983) 289.

[148] On the intermediate formulae, see Karl Spielbüchler, 'Grundrecht und Grundrechtsformel' (n 147) 291 ff.

[149] See, e.g., *VfSlg.* 20.186/2017, concerning a legal expropriation: 'As regards the right to property, measures depriving a person of his or her possessions must be considered unconstitutional unless such an expropriation is required by the public interest. This is only the case if there is a specific demand whose fulfilment is in the public interest, if the property in question is appropriate to satisfy this need, and if it is impossible to meet this need in another way than by resorting to expropriation.'

[150] *VfSlg.* 7138/1973.

[151] Cf Christoph Grabenwarter, *Rechtliche und ökonomische Überlegungen zur Erwerbsfreiheit* (Facultas, Vienna, 1994) 103 (including n 311).

[152] *VfSlg.* 10.291/1984, 18.893/2009.

[153] *VfSlg.* 18.965/2009.

[154] Michael Holoubek, 'Grundsätze des verfassungsgerichtlichen Verfahrens' (n 124) 441 ff; Claudia Fuchs, 'Verfassungsvergleichung durch den Verfassungsgerichtshof' (2010) 43 Journal für Rechtspolitik 176; Harald Eberhard, 'Funktionalität und Bedeutung der Rechtsvergleichung in der Judikatur des VfGH', in Anna Gamper and Bea Verschraegen (eds), *Rechtsvergleichung als juristische Auslegungsmethode* (Jan Sramek Verlag, Vienna, 2013) 141.

a foreign legal and constitutional order, and consequently comes to quite different results in individual cases.[155]

iii. The interpretive practice

The interpretive practice of the Constitutional Court has undergone a fundamental change in the various phases of its history. This has taken place in a complex process of reciprocal influence between the academy and constitutional jurisdiction, which the concluding section will describe in greater detail.[156] In brief, the value-critical attitude of the 'Pure Theory of Law' (*Reine Rechtslehre*) determined the interpretive practice for decades before scholarship started providing essential methodological impulses for a more value-oriented interpretation of the Constitution in the 1970s. This started having a measurable impact in the late 1980s, especially in the field of human rights,[157] which was also influenced by ECtHR judgments.[158]

As far as the currently prevailing interpretive approaches of the Constitutional Court are concerned, it is difficult to ascertain a uniform approach. Instead, the interpretations sometimes evince considerable differences depending on the area of constitutional law involved. Thus, the jurisprudence on the law of constitutional structure or of the allocation of powers between the federation and the *Länder* is quite strict and formal. Thus, we might draw attention to the 'theory of petrification' (the '*Versteinerungstheorie*', which should be understood as a variant of the historico-systematic interpretation)[159] in the interpretation of power-allocating provisions. According to this theory, unless the *B-VG* provides otherwise, the terms used in these provisions should be given the meaning they had under the legal order of the time when the provisions took effect.[160] Likewise, the interpretive approach is very formal in matters of electoral law. The decisions of the Constitutional Court nearly always set forth that voting ordinances, and in particular those governing the formal organization of the voting procedure, must be interpreted strictly in accordance with their wording.[161] The two examples show that both the Court and constitutional scholarship emphasize a textualist and historical interpretation. In the area of fundamental rights, formal interpretative approaches are considered less important than taking a

[155] Cf, e.g., *VfSlg.* 18.541/2008 on the prohibition of *quota litis* agreements (s 879 para 2 no 2 *ABGB* and s 16 para 1 *RAO*).

[156] See below, section E.2.

[157] Richard Noval traces the influence and developments with acuity in 'Verhältnismäßigkeitsgebot und Grundrechtsschutz', in Bernhard Raschauer, *Beiträge zum Verfassungs- und Wirtschaftsrecht. Festschrift für Günther Winkler* (Springer, Vienna, 1989) 39 ff. Cf also Theo Öhlinger, 'Die Entstehung und Entfaltung des österreichischen Modells der Verfassungsgerichtsbarkeit' (n 61) 581, 598 ff.

[158] Cf Walter Berka, 'Die Europäische Menschenrechtskonvention und die österreichische Grundrechtstradition' (1979) 34 Österreichische Juristen-Zeitung 365, 428.

[159] On this attribution, see Christoph Grabenwarter, *Ladenschlußrecht* (Springer, Vienna, 1992) 149 ff; Ewald Wiederin, 'Anmerkungen zur Versteinerungstheorie', in Herbert Haller (ed), *Staat und Recht. Festschrift für Günther Winkler* (Springer, Vienna, 1997) 1233 ff.

[160] See, for example, *VfSlg.* 11.503/1987.

[161] See, for example, *VfSlg.* 12.289/1990, 14.556/1996, 19.246/2010, 19.734/2013. On this basis, the Constitutional Court, given the constitutional situation at the time, which to this extent matched art 38 of the German constitution, ruled that postal voting was inadmissible in view of the requirement that voting be secret and personal (*VfSlg.* 10.412/1985). In the meantime, the legislature has expressly and with constitutional effect declared postal voting admissible (art 26 para 6 *B-VG*).

balanced view. In the law of constitutional structure, rulings tend to give preference to systematic arguments based on objective considerations, arguments that are guided by a highly abstract idea of the system.[162] This tendency has drawn criticism from academic circles. Otherwise, the Constitutional Court today makes use of all standard methods of interpreting and, if necessary, developing the law. The rules of interpretation endorsed by the Civil Code (*Allgemeines Bürgerliches Gesetzbuch, ABGB*) are applied as well.[163]

The Constitutional Court increases its scope of interpretation and decision-making through what are known as 'constitutionally compliant' interpretations, whereby a law or ordinance is to be interpreted in such a way that it does not interfere with the Constitution. It is applied in cases where the Constitutional Court considers it preferable to refrain from actually striking down a law. Only at first glance is this procedure an expression of judicial restraint. In fact, the instrument of 'constitutionally compliant interpretation' allows a sometimes far-reaching interference with the freedom of the legislature. Whereas the annulment of a statute grants the legislature an opportunity for revision, the 'constitutionally compliant' interpretation enforces the validity of law but predicates this on a certain interpretation.

The interpretive leeway is more limited in the area of procedural law, particularly when it comes to examining the procedural requirements for the admissibility of an application. The Court adjudicates numerous applications at the level of admissibility through a very strict treatment of the procedural requirements. This especially applies to court applications in the judicial-review procedure of article 140 *B-VG*. A common reason for rejection, particularly of court applications, is that the scope of the contested legal provisions is too narrow or too broad. Not infrequently, the extent of the challenge that the Constitutional Court agrees to be relevant is the result of subtle legal considerations. Thus, courts or individuals submitting an application to the Court make numerous contingent motions that include every possible degree to which the contested statute or ordinance might be struck down or restricted in scope. More recently, the Constitutional Court has responded to this problem by continuing to reject cases that are too narrow but by not dismissing out of hand motions that are too broad, choosing instead to reject the part that goes beyond admissibility.[164]

iv. The workload and the average length of individual cases

Since the early 1990s, the Constitutional Court has adjudicated about 2,500 to 3,000 cases each year, not counting those instances in which numerous similar applications were filed in respect of a single legal problem. In 2008, following the establishment of an Asylum Court,[165] and simultaneous restrictions on access to the Administrative Court,

[162] See, for example, *VfSlg.* 14.473/1996, 17.967/2006, 19.636/2012, 19.917/2014.

[163] See, for example, *VfSlg.* 16.350/2001 (analogy); *VfSlg.* 12.184/1989, 14.282/1995 (*lex posterior/lex specialis*). For more, see Christoph Grabenwarter, 'Das Zivilrecht in der Judikatur des Verfassungsgerichtshofs', in Constanze Fischer-Czermak (ed), *Festschrift 200 Jahre ABGB*, vol 2 (Manz, Vienna, 2011) 1507.

[164] See, for example, *VfSlg.* 16.989/2003.

[165] Roughly spoken, the Constitutional Court has been the only court to review decisions of the Asylum Court. Due to the creation of lower administrative courts in 2014, the Asylum Court was abolished in 2014.

the number of petitions increased sharply; roughly speaking, there was a temporary doubling of the workload.[166] Approximately 90 per cent of the rulings took place on the basis of the procedure laid down in article 144 *B-VG* (old version) (decisions issued by administrative authorities) or article 144a *B-VG* (old version) (decisions of the Asylum Court). Judicial review is equally divided between the review of statutes and the review of ordinances: in 2017, the Court decided 320 cases in which it reviewed legislation and 131 cases in which it examined ordinances. Over the years, the average duration of proceedings has remained constant at around 200 days; over the past ten years, proceedings took around seven months per case on average, from the date of submission to the Court's ruling. The 'small bench' decides 99 per cent of the cases. These decisions predominantly take the form of dismissing the admissibility of complaints under article 144 para 2 *B-VG*. The full court decides about 200 to 250 cases a year.

b) The Review of Abstract and General Legal Acts

i. Statutes

Under the terms of article 140 *B-VG*, the Constitutional Court has the power to rule on the unconstitutionality of a (proclaimed) federal or *Land* statute.[167] Both historically and currently, the judicial review of statutes towers above the other powers of the Court as a special characteristic of Austrian constitutional adjudication.

The Constitutional Court has no power to act against non-action by the legislature. Neither article 140 *B-VG* nor any other provision of the Federal Constitution authorizes the Constitutional Court to oblige the legislature to pass any law.[168] The situation is different if it is merely a partial omission, that is to say, if there is a connection with an existing legal provision that allows it to be regarded as a reference point for the effects that the legislative omission entails.[169] Consequently, if the unconstitutionality of a provision is such that the said provision does not contain a constitutionally required regulatory component, the Constitutional Court may take up that omission by striking down the whole provision on the grounds that it is incomplete from a constitutional perspective.[170]

In principle, judicial review of legislation depends on an application being made to the Court. The Justices can only initiate judicial review *ex officio* if they have to apply the relevant law in a case already pending before them (article 140 para 1 no 1 (b) *B-VG*). In addition, the ordinary courts (article 89 para 2 *B-VG*), the lower administrative courts, and the Administrative Court (article 135 para 4 in conjunction with article 89 para 2 *B-VG*) are entitled to file applications (article 140 para 1 no 1 (b) *B-VG*). Furthermore, the federal government and—if the constitution of the individual *Land*

[166] In 2009, there were 5,489 new cases; in 2010, 5,133; in 2011, 4,400; in 2012, 4,643; in 2013, 4,158; and in 2014, 2,995.

[167] On the concept of law within the meaning of article 140 *B-VG*, Heinz Schäffer and Benjamin Kneihs, 'Art. 140 B-VG', in Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (12th edn, Verlag Österreich, Vienna, 2013) paras 20 ff.

[168] *VfSlg.* 14.453/1996.

[169] *VfSlg.* 14.453/1996; Peter Oberndorfer, 'Die Verfassungsrechtsprechung im Rahmen der staatlichen Funktionen' (n 90) 196 ff.

[170] For the most recent example, see *VfSlg.* 19.282/2010.

so provides—one-third of the members of a *Land* assembly have the power to challenge *Land* legislation (article 140 para 1 no 3 *B-VG*); and a *Land* government, one third of the members of the *Nationalrat*, and one third of the members of the *Bundesrat* have the power to contest federal laws (article 140 para 1 no 2 *B-VG*).

Finally, individuals who claim that the alleged unconstitutionality of a law directly violates their rights also have a right to application. This requires that the statute in question has actually become effective for the individual without the need for a court decision or an administrative notice (the so-called 'individual application', article 140 para 1 no 1 (c) *B-VG*). In the actual practice of the Constitutional Court, the Justices apply strict criteria to the admissibility requirements for an individual application. Ever since a decision handed down in 1977,[171] the Constitutional Court has demanded that the (legally protected) interests of the applicant be not only potentially but actually affected by the contested provision. In addition, the Court emphasizes that the individual remedy is intended to provide legal protection against unconstitutional laws only to the extent that no other reasonable remedy is available.[172] A reasonable way of asserting the alleged unconstitutionality of statutes or ordinances would be open to concerned individuals if a judicial or administrative procedure were pending or could reasonably be initiated that would give them the opportunity to raise their objections to the law in question and to request that an application for review be submitted (by the court) to the Constitutional Court.[173] In practice, this ruling has led to numerous individual applications being rejected as inadmissible.

Since the beginning of 2015, the Court's jurisdiction has also included reviewing statutes on the application of parties to judicial proceedings. Furthermore, it may pronounce on the unconstitutionality of a law on the application of a person who, as a party to a case decided by a court of first instance, alleges, on the occasion of an appeal filed against that decision, that the application of an unconstitutional statute infringed her rights (the so-called 'party application for the review of a statute', article 140 para 1 no 1 (d) *B-VG*).

If the law is no longer in force by the time the Constitutional Court hands down its ruling and the procedure was initiated by the Court itself or the application was filed by a court or by a person that alleges a direct infringement of her rights by the unconstitutionality of the law, the Constitutional Court is required to pronounce itself on the issue of unconstitutionality (article 140 para 4 *B-VG*). If a law has been annulled on grounds of unconstitutionality or if the Constitutional Court has ruled that a law was unconstitutional, all courts and administrative authorities are bound by the ruling of the Constitutional Court. However, the law continues to apply to all circumstances effected before the annulment (the annulment is not retro-active, in other words), except for the circumstances that occasioned the application to the Constitutional Court, unless the Constitutional Court rules otherwise when striking down the law. If the Constitutional Court sets a deadline for the annulment of a law, the law continues

[171] *VfSlg.* 8009/1977.

[172] See, for example, *VfSlg.* 11.803/1988, 13.871/1994, 15.343/1998, 16.722/2002, 16.867/2003.

[173] See, for example, *VfSlg.* 18.568/2008, and Michael Rohregger, 'Art. 140 B-VG', in Karl Korinek and Michael Holoubek (eds), *Österreichisches Bundesverfassungsrecht* (6th delivery, Verlag Österreich, Vienna, 2003)paras 162 ff.

to apply to all circumstances effected up to said deadline, with the exception of the circumstances that gave rise to the action (article 140 para 7 *B-VG*).

The decision of the Constitutional Court to strike down a statute as unconstitutional or to declare the unconstitutionality of a statute that is no longer in force obliges the Federal Chancellor or the relevant *Landeshauptmann* (*Land* governor) to immediately proclaim the annulment. The annulment comes into force at the end of the day of its proclamation, unless the Constitutional Court sets a different date. This period may not exceed eighteen months (article 140 para 5 *B-VG*). Below that threshold, the calculation is at the discretion of the Constitutional Court. If the Court strikes down a law as unconstitutional, any legal provisions repealed by the law thus declared unconstitutional re-enter into force on the effective date of the annulment, unless the Justices state otherwise. The proclamation of the annulment of the law must also include a statement as to whether any legal provisions, and, if so, which, will come back into force as a result (article 140 para 6 *B-VG*). This possibility is rarely used;[174] the Constitutional Court regularly rules that earlier legal provisions shall not re-enter into force.

ii. Ordinances and re-promulgations (declaratory promulgations)

The Constitutional Court also rules on the lawfulness of ordinances issued by a federal or *Land* authority (article 139 *B-VG*). According to repeated rulings by the court, an ordinance (*Verordnung*) is any non-statutory administrative pronouncement with the force of law issued by an administrative authority.[175] An ordinance is to be seen as a 'general norm' if it is pertinent to the population as a whole or to defined groups in the population that are characterized not individually but generically; the ordinance must be immediately legally binding on this group, i.e., define their legal situation.[176] The provisions on the review of laws apply, *mutatis mutandis*, to ordinances.

The initiation of judicial review of an ordinance requires an application as well. *Ex officio* initiation is only permissible if the court has to apply an ordinance in a pending case (article 139 para 1 no 2 *B-VG*). Otherwise, the ordinary courts (article 89 *B-VG*), the lower administrative courts, and the Administrative Court (article 135 para 4 in conjunction with article 89 *B-VG*) are entitled to file applications (article 139 para 1 no 1 *B-VG*); so are the federal government or, if a *Land* constitution declares the Ombudsman's office (*Volksanwaltschaft*) competent in matters relating to the administration of the *Land* concerned, the Ombudsman's office or a body within the meaning of article 148i para 2 *B-VG* with regard to ordinances issued by a *Land* authority (article 139 para 1 no 6 *B-VG*), and a *Land* government or the Ombudsman's office with regard to ordinances issued by a federal authority (article 139 para 1 no 5 *B-VG*). Finally, individuals also have a right to bring cases before the Constitutional Court if one of two conditions applies: first, if those individuals allege that the unlawfulness of the ordinance directly infringes their rights, provided that the ordinance has become effective for them without the pronouncement of a court ruling and without the issue of an administrative notice (the so-called 'individual application', article 139 para 1

[174] Recently, for example, *VfSlg.* 19.719/2012.
[175] See, for example, *VfSlg.* 11.472/1987, 13.021/1992, 18.112/2007.
[176] See, for example, *VfSlg.* 8648/1979, 11.472/1987, 18.112/2007.

no 3 *B-VG*). Second, if, as a party to a case decided by a court of first instance, they allege in an appeal against that decision that the ordinance infringes their rights (the so-called 'party application for review of an ordinance', article 1 para 4 *B-VG*).

Article 49a *B-VG* empowers the Federal Chancellor, together with the responsible federal ministers, to re-promulgate (*wiederverlautbaren*) federal laws and those international treaties published in the Federal Gazette (*Bundesgesetzblatt*) in their current version by publishing them anew in the Federal Gazette. The re-promulgation does not change the substantive content of a legislative provision but establishes a newly valid legal text which retains the sense of the wording of the original law(s); it is therefore not an act of legislation.[177] Under article 139a *B-VG*, the Constitutional Court has the power to review such re-promulgations of laws or treaties for constitutionality. Article 139 *B-VG* applies *mutatis mutandis* to the right to application, to decisions of the Court, and to their effects.

iii. International treaties

Finally, the Constitutional Court decides in the context of judicial review on the lawfulness of international treaties ('state treaties', article 140a *B-VG*). In the case of political state treaties, state treaties that amend laws, and state treaties that change the treaty basis of the European Union, the Constitution (article 140 *B-VG*) provides the relevant standard; for all other international treaties, statutory law does so too (article 139 *B-VG*). The procedural rules for the review of statutes or ordinances are to be applied *mutatis mutandis* with the following provisos: a state treaty whose unconstitutionality or unlawfulness the Court has determined[178] may not be applied, from the end of the day on which the decision is proclaimed, by the organs mandated to implement it unless the Constitutional Court sets a different period within which the state treaty shall continue to be implemented. In the case of political state treaties, state treaties that amend laws, and state treaties that change the treaty basis of the European Union, this period may not exceed two years; in the case of all other state treaties, it may not exceed one year.

Under the terms of article 140a *B-VG*, the Constitutional Court is also empowered to decide on the lawfulness of the European Treaties.[179] [180] This, in addition to the

[177] *VfSlg.* 15.671/1999.

[178] A decision of the Constitutional Court in the procedure under article 140a *B-VG* is of a purely declarative nature. Therefore, the Constitutional Court cannot strike down a state treaty.

[179] Generally speaking, the Treaty of Accession to the EU, Federal Law Gazette (*Bundesgesetzblatt*) 45/1995, the Treaty of Amsterdam of 2 October 1997, the Treaty of Nice of 26 February 2001, and the Treaty of Lisbon of 13 December 2007 are state treaties concluded with the consent of the *Nationalrat*. The EU Accession Treaty, the Treaty of Amsterdam, and the Treaty of Nice were each concluded on the basis of a specific federal law with constitutional status, which meant the approval of the *Nationalrat* was not granted in accordance with article 50 *B-VG*. Bundesverfassungsgesetz über den Beitritt Österreichs zur Europäischen Union, Federal Law Gazette (*Bundesgesetzblatt*) 744/1994, Bundesverfassungsgesetz über den Abschluss des Vertrages von Amsterdam, Federal Law Gazette (*Bundesgesetzblatt*) I 76/1998, Bundesverfassungsgesetz über den Abschluss des Vertrages von Nizza, Federal Law Gazette (*Bundesgesetzblatt*) I 120/2001). The Treaty of Lisbon was approved by the *Nationalrat* under the terms of art 50 para 1 no 2 in conjunction with art 50 para 4 *B-VG* in the version of Federal Law Gazette (*Bundesgesetzblatt*) I 2/2008 (cf *VfSlg.* 18.740/2009). Cf Christoph Grabenwarter, 'Völkerrecht, Recht der Europäischen Union und nationales Recht', in August Reinisch (ed), *Österreichisches Handbuch des Völkerrechts* (5th edn, Manz, Vienna, 2013) 121.

[180] For more detail, see Wolf-Dietrich Grussmann, 'Auswirkungen eines EG-Beitrittes auf die österreichische Verfassungsgerichtsbarkeit' (1990) 15 Zeitschrift für Verwaltung 427, 436 ff.

power of the Constitutional Court to apply the European Charter of Fundamental Rights as constitutionally guaranteed rights (see below, [paras 127–130]), can be seen as a further exception to the maxim that EU law is not in principle subject to the constitutional review of the Constitutional Court.[181]

c) The Review of Individual Legal Acts

Since the reform of administrative jurisdiction in 2012, the Constitutional Court's jurisdiction includes, under article 144(1) *B-VG*, adjudicating appeals against the decisions and orders[182] of a lower administrative court. This is possible insofar as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or a violation of other rights on the score of an illegal ordinance, an illegal pronouncement on the re-promulgation of a law (treaty), an unconstitutional law, or an unlawful treaty. In the context of this provision, the object of the Court's review is not the administrative procedure as a whole, since only the violation of constitutionally guaranteed rights or the violation of rights through the application of an unconstitutional statute or ordinance can be asserted. The Court must consider whether such a qualified unlawfulness exists only on the basis of the contested act of the lower administrative court, including the lower administrative court proceedings leading up to it, and not on the basis of the decision and procedure of the administrative authority as well.[183] The Court can refuse to deal with an appeal if the latter has no reasonable chance of success or if the final ruling is not expected to clarify a constitutional issue (article 144 para 2 *B-VG*). In practice, the vast majority of such appeals encounter this refusal.

If the Constitutional Court finds that the contested judgment of a lower administrative court did not violated a constitutionally guaranteed right, or refuses to deal with an appeal, it must, upon request of the appellant, delegate to the Administrative Court the decision on whether any *other* right of the applicant was violated (article 144 para 3 *B-VG*). It is not within the remit of the Constitutional Court to examine whether an appeal to the Administrative Court is admissible.[184] The delegation of the appeal initiates the time limit for final appeals (*Revisionen*).[185]

d) The Procedure in Conflicts of Jurisdiction

i. Adjudicating conflicts of jurisdiction

Pursuant to article 138 para 1 *B-VG*, the Constitutional Court adjudicates positive and negative conflicts of jurisdiction between courts and administrative authorities (para 1

[181] Cf, for example, Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (10th edn, Facultas, Vienna, 2014) 111.

[182] Cf art 144 para 4 *B-VG*.

[183] Cf *VfGH* of 11 March 2014, B 40-41/2014.

[184] Cf *VfSlg.* 19.867/2014.

[185] Section 26 para 4 *VwGG*. It is true that the party is not prevented from appealing both to the Administrative Court and (at the same time) to the Constitutional Court. In such a case, the petition cannot be delegated.

no 1), between ordinary courts and lower administrative courts or the Administrative Court, between the Constitutional Court itself and all other courts (para 1 no 2), and between the federal organs and a *Land* or between *Länder* (para 1 no 3). However, the power of the Constitutional Court to decide conflicts of jurisdiction is not all-encompassing: it does not include adjudicating conflicts of jurisdiction between the Federal President and the federal government, between the federal government and individual federal ministers, or between individual federal ministers.[186] Nor is it within the remit of the Constitutional Court to decide on conflicts of jurisdiction within the administrative court system, i.e., between lower administrative courts or between a lower administrative court and the Administrative Court; such conflicts are to be resolved by the Administrative Court in proceedings set forth by article 133 para 1 no 3 *B-VG*.

Article 126a *B-VG* establishes the jurisdiction of the Constitutional Court to settle disagreements between the Court of Auditors (*Rechnungshof*) and a potential examinee on the interpretation of the legal provisions governing the jurisdiction of the Court of Auditors.[187] Finally, the Constitutional Court decides on disagreements between the Ombudsman's office (*Volksanwaltschaft*) and the federal government or a federal minister on the interpretation of the legal provisions that govern the jurisdiction of the Ombudsman's office (article 148f *B-VG*).[188]

ii. Establishing jurisdiction

Under the terms of article 138 para 2 *B-VG*, the Constitutional Court determines, at the request of the federal or a *Land* government, whether an act of legislation or enforcement falls within the jurisdiction of the central authority or the *Länder*. This instrument of proactive review is exceptional among the powers of the Constitutional Court.[189] In a proceeding under article 138 para 2 *B-VG*, the Constitutional Court has to examine the question of competence exclusively on the basis of the allocation of powers prescribed by the federal constitution. In such a proceeding, therefore, it is not necessary to examine whether the proposed law itself is constitutional.[190]

e) Organ Disputes Relating to Committees of Inquiry

The 2015 decision to extend the Court's jurisdiction to disputes that arise from the work of committees of inquiry is closely connected with the reorganization of this means of parliamentary control, a reorganization that was decided after long political debates. Now, for instance, a committee of inquiry can be set up at the request of

[186] Theo Öhlinger and Harald Eberhard, *Verfassungsrecht* (n 181) 446.

[187] Under art 127c (1) *B-VG* a *Land* constitution may create a corresponding arrangement for the sphere of competence of a *Land* Court of Auditors.

[188] For a *Land* Ombudsman, a similar arrangement may be provided for by the *Land* constitution (art 148i (2) *B-VG*).

[189] Cf Niklas Sonntag, *Präventive Normenkontrolle in Österreich* (Nomos, Baden-Baden, 2011) 139 ff.

[190] *VfSlg.* 3685/1960, 7959/1976, 13.322/1992.

only one quarter of the members of the *Nationalrat*.[191] Essentially, the Constitutional Court has jurisdiction over disagreements that occur before or during the work of a committee of inquiry. The matters that can thus be raised are manifold. They range from issues regarding the admissibility of the establishment of a committee of inquiry in the first place[192] and evidence[193] and information-gathering issues[194] to questions whether the committee's work has violated privacy or personal-integrity rights.[195] The corresponding powers of the Constitutional Court are specified in a comprehensive section of the *VfGG*. As a procedural peculiarity, it should be emphasized that the Court shall in principle issue its decision within four weeks.[196]

f) Decisions on Treaties Between Constituent Units of the Federation

Article 15a *B-VG* provides for the conclusion of treaties between the Federation and the *Länder* or between individual *Länder* (constituent state treaties). At the request of the federal government or one of the *Land* governments involved, the Constitutional Court determines whether a treaty falls within the meaning of article 15a para 1 *B-VG* and whether the *Land* or the central authority has fulfilled the obligations ensuing from such a treaty, with the exception of those pertaining to pecuniary rights (article 138a para 1 *B-VG*). The same applies to treaties within the meaning of article 15a para 2 *B-VG* if a *Land* government involved so requests (article 138a para 2 *B-VG*).

g) Jurisdiction in Matters of Electoral Law

Article 141 *B-VG* assigns to the Constitutional Court the power to adjudicate challenges to elections. The constitutional review extends not only (as is typical of constitutional courts) to the election of the head of state, elections to parliaments, including the European Parliament, and elections to a *Land* government and certain elected organs of a municipality. In an Austrian particularity,[197] it also extends to elections to the representative bodies of statutory professional associations. Finally, it extends to decisions on the disqualification to serve on an elected body and on disputes over the outcome of referendums and domestic administrative decisions concerning European citizens' initiatives.

h) State Jurisdiction (Staatsgerichtsbarkeit)

Pursuant to article 142 *B-VG*, the Constitutional Court has jurisdiction to decide on impeachments relating to the constitutional responsibility of the supreme federal and *Land* organs for culpable infringements of rights resulting from the exercise of

[191] Art 53 para 1 *B-VG*. [192] Art 138b para 1 no 1 *B-VG*.
[193] Art 138b para 1 nos 2, 3 *B-VG*. [194] Art 138b para 1 no 4 *B-VG*.
[195] Art 138b para 1 no 7 *B-VG*.
[196] See, for example, s 56c para 6 *VfGG*. The committee report points out that as 'rapid a decision by the Constitutional Court as possible is essential' (IA 718 BlgNR 25. GP, 21).
[197] For more detail, see Gerhard Strejcek, 'Strukturfragen der Wahlgerichtsbarkeit' (2000) 122 Juristische Blätter 763.

their authority. In particular, impeachment proceedings may be brought against the Federal President (only for violations of the federal constitution), members of the federal government and other bodies equivalent in their functions, against an Austrian representative in the Council of the European Union, against the members of a *Land* government and equivalent organs, against a *Land* governor or her deputy, and against organs of the federal capital Vienna, provided they undertake tasks in the field of federal enforcement in their own sphere of authority.

The only penalty the Constitutional Court can impose is the loss of office and, in particularly serious cases, the temporary loss of political rights. In the case of minor offences, the Constitutional Court may confine itself to declaring that there has been an infringement of the law in the cases designated in article 142 para 4 *B-VG*.

According to article 143 *B-VG*, an impeachment can also be filed in cases of alleged criminal acts connected with the official activity of the accused. In this case, the Constitutional Court has exclusive jurisdiction; any investigation already pending before the ordinary criminal courts reverts to it. The Constitutional Court also applies the provisions of the relevant criminal law in such cases.

The instrument of impeachment provided for in articles 142 and 143 *B-VG* is seldom used. No admissible impeachment has ever been filed against a federal minister, and only in three cases against a *Land* governor, with just one resulting in a conviction.[198]

i) International Law Jurisdiction

Under article 145 *B-VG*, the Constitutional Court decides on violations of international law according to the provisions of a special federal statute. Because no such law has yet been passed, the prevailing opinion is that the Constitutional Court has no jurisdiction to decide on violations of international law.[199]

j) Jurisdiction Regarding Pecuniary Claims and European State Liability

Under the terms of article 137 *B-VG*, the Constitutional Court adjudicates pecuniary claims against the federal government, the *Länder*, municipalities, and associations of municipalities, provided that the claims do not fall within the remit of ordinary law nor can be dealt with by decision of an administrative authority. The responsibilities summarized in this article are called *Kausalgerichtsbarkeit* (roughly: 'residual jurisdiction').

The provision is intended to close gaps in legal protection by establishing a residual jurisdiction of the Constitutional Court to decide on pecuniary claims against the corporate bodies mentioned above. Sec 1 of the *Jurisdiktionsnorm* ('provision of jurisdiction') assigns 'jurisdiction in private-law matters' to the ordinary courts. In other matters, the administrative authorities, in accordance with the principle of legality (article 18 *B-VG*), only have the power to decide in matters the law specifically assigns

[198] *VfSlg.* 10.510/1985 (non-compliance on the part of a *Land* governor with an instruction).

[199] For a contrasting view, see Alexander Balthasar, 'Art 145 B-VG, die verdrängte Kompetenz' (2009) 64 Zeitschrift für öffentliches Recht 23, 35 ff.

to them. If a pecuniary claim does not constitute a private-law matter and an administrative authority has no competence to deal with it, the way is cleared for action under article 137 *B-VG*.

Its jurisdiction under article 137 *B-VG* was also the basis for the Constitutional Court's view that it had jurisdiction to decide on state-liability claims in the context of European Union law.[200] These notably include the liability of the state in the event of poor implementation of directives ('legislative injustice') and state liability for wrong decisions on the part of apex courts.[201]

D. The Role and Functions of Constitutional Adjudication

1. The Relationship with the Legislature

There is inevitably going to be tension between the legislature and a constitutional court whose core powers from the outset have included reviewing laws for constitutionality. The scholarly discussion also refers to the Constitutional Court as a 'negative legislator' that can strip a law of its validity through a judicial ruling. For a long time, the Court and the constitution it guarded were not in a strong position, as the developments surrounding the 1929 constitutional amendment (see above, pp 32–3) make clear in retrospect. Constitutionalism and the constitutional culture were not so fully fledged that an independent Constitutional Court and its decisions were beyond the reach of government and lawmakers. Strengthened by government coalitions that commanded a two-thirds majority in parliament, legislators believed they could 'correct' unwelcome Constitutional Court decisions by amending the Constitution.[202] A further aggravating factor in Austria is that amendments do not have to be made to the core document of the Constitution; on the contrary, constitutional law can be inserted into the text of any federal law, although it must be flagged as a 'constitutional provision' (article 44 para 1 *B-VG*).

Today, legislators seldom fail to accept politically disagreeable decisions of the Constitutional Court. On several occasions until the 1990s, ordinances that originally had the force of statutory law and were struck down by the Constitutional Court as unconstitutional were passed back into law as constitutional provisions.[203] Now, the rule-of-law principle of the Constitution, as interpreted by the Court, only permits such a 'correction' of Constitutional Court rulings, which seeks to immunize the law against the Court's review, to a certain extent.[204] One of the best-known examples in this context is the ruling of the Constitutional Court on so-called 'driver disclosure'. These cases revolved around the duty, initially established in statutory law, of the

[200] See, for example, *VfSlg*. 17.002/2003, 17.019/2003, 17.095/2003.

[201] Under the terms of the Law on Official Liability (*Amtshaftungsgesetz, AHG*), these claims cannot be enforced through the ordinary courts (cf s 2 para 3 *AHG*. They do exist, however, if the liability requirements are present. See, for instance, ECJ, Case C-224/01 *Köbler* [2003] ECR I-10239 (ECLI:EU:C:2003:513) para 126; Case C-173/03 *Traghetti del Mediterraneo* [2006] ECR I-5177 (ECLI:EU:C:2006:391) paras 30 ff.

[202] Alexander Somek, 'Wissenschaft vom Verfassungsrecht: Österreich', in Armin von Bogdandy, Pedro Cruz Villalón, and Peter M Huber (eds), *IPE vol II* (Heidelberg, CF Müller, 2008) 644 ff.

[203] See, for instance, Ludwig Adamovich, 'Verfassungsgericht und Parlament' (n 103) 270 ff.

[204] See Martin Hiesel, *Verfassungsgesetzgeber und Verfassungsgerichtshof* (Manz, Vienna, 1995) 101 ff.

keeper of a motor-vehicle to inform an administrative authority, upon request (usually in connection with the suspected commission of a traffic offence), of the identity of the driver of the vehicle at a given time. The Constitutional Court held that this provision, which implied a duty to self-incriminate, a violation of the principle of indictment (article 90 para 2 *B-VG*) and of equality and annulled the provision.[205] As a result, the legislature passed a substantially identical provision, but this time of constitutional status, which meant it was more difficult to contest before the Constitutional Court.

In recent years, however, the Constitutional Court has only accepted such 'corrections' if the scope of a provision is narrowly limited and its content can be interpreted in conformity with fundamental principles. With this reasoning, the Constitutional Court also considered the 'driver disclosure' described above compatible with the fundamental principles of the Austrian federal constitution after it had been adopted as a statute with constitutional status.[206] On the other hand, it considered it to be incompatible with the fundamental principles when the legislature simply suspended the Constitution with respect to a subsection of the legal system, the Court considered this action incompatible with the fundamental principles, as the suspension would have abolished, at the same time, the power of the Constitutional Court to exercise judicial review in this area.[207]

2. The Constitutional Court and Civil, Criminal, and Administrative Jurisdiction

The relationship between the Constitutional Court and the specialized courts is neither one of superordination nor one of subordination. According to the conception of the Austrian federal constitution, constitutional jurisdiction, ordinary, and administrative jurisdictions formally relate to each other on a basis of parity. In practice, this has the consequence that decisions of the Administrative Court as the highest court of administrative jurisdiction and decisions of the *Oberster Gerichtshof* ('Supreme Court', *OGH*) as the highest court of civil and criminal jurisdiction are not in principle subject to any review by the Constitutional Court. Thus, in the area of ordinary jurisdiction, the Constitution is safeguarded through constitutionally compatible interpretations on the part of the *OGH*, albeit without the possibility of review by the Constitutional Court, as decisions of civil and criminal courts cannot be contested before the Justices. The review of court decisions, notably their compatibility with constitutionally guaranteed rights, takes place only within the ordinary jurisdiction and within the framework of the law relating to civil and criminal court procedure.[208]

[205] *VfSlg.* 9950/1984; 10.394/1985. [206] *VfSlg.* 11.829/1988.

[207] See *VfSlg.* 16.327/2001 on the constitutional provision of s 126a *BVergG*, Federal Law Gazette (*Bundesgesetzblatt*) I 56/1997 in the version of Federal Law Gazette (*Bundesgesetzblatt*) I 125/2000. This provision declared all *Land* laws that were in force on 1 January 2001 and regulated the organization and powers of organs responsible for providing legal protection in public-procurement matters as 'not incompatible with the federal constitution'. See, for example, Martin Hiesel, 'Gibt es in Österreich unabänderliches Verfassungsrecht?' (2002) 57 Österreichische Juristen-Zeitung 121.

[208] For more details, see Oskar Ballon, 'Verfassungswidrigkeiten in der Zivilgerichtsbarkeit und ihre Anfechtung' (1983) 38 Österreichische Juristen-Zeitung 225. See, too, however, the Basic-Rights Complaint Act (*Grundrechtsbeschwerdegesetz*).

One of the (rare) examples of courts being able to use this arrangement to relativize decisions of the Constitutional Court is the case-law the Supreme Court established in the wake of the decision *VfSlg.* 16.562/2002, in which the Constitutional Court partially annulled the former version of section 12a of the Act to Offset Family Burdens (*Familienlastenausgleichsgesetz, FLAG*) (old version). The Court had stated in this judgment that the partial annulment in no way implied that henceforth the family allowance should always be fully offset against the maintenance obligation of the obligated parent. However, the Supreme Court held that 'according to the cited rulings of the Constitutional Court, the family allowance was not intended to relieve the father' and that 'even after section 12a para 2 of the *FLAG* has been struck down as unconstitutional, it remains unchanged in the case of non-taxpayer maintenance debtors, as the case-law of the *OGH* has stated, that the family allowance may not be offset against the maintenance obligation of the obligated parent'.[209] In choosing this line of argument, the Supreme Court deliberately deviated from the case-law of the Constitutional Court. This divergence in case-law remained an exception, however.

In certain types of procedures and procedural configurations, there are specific forms of task sharing that are derived from the general constitutional allocations of powers. Even today, the relationship between the Constitutional Court and the Administrative Court is still characterized by the 'division of labour' that existed between the *Reichsgericht* and the *Verwaltungsgerichtshof* before the *B-VG* was enacted. Even under the terms of the 1920 *B-VG*, administrative decisions at the highest level could be challenged both before the Constitutional Court and before the Administrative Court. From the beginning of 2014, however, the path of legal recourse no longer forks after the last administrative instance but after the first stage of administrative court jurisdiction. The delimitation of the review powers of the courts of public law depends on the content of the challenge: if it is based on an alleged violation of rights guaranteed by law, only the Administrative Court is competent as a review body within the administrative jurisdiction. If the applicant claims, however, that rights enshrined in the Constitution have been violated, the Constitutional Court has exclusive jurisdiction (article 133 para 5 in conjunction with article 144 para 1 *B-VG*). Conflicts of jurisdiction are thereby excluded. If conflicts of jurisdiction do arise in individual cases, the Constitutional Court is called upon to rule on them in accordance with article 138 para 1 no 2 *B-VG*.

Regular constitutional discussions[210] on the possibility of an *Urteilsverfassungsbeschwerde*, i.e., a complaint contesting the constitutionality of a court ruling, have led to the introduction of the right of a party to a court case to apply for judicial review: since 1 January 2015, the Constitution Court has the power to rule on the constitutionality of a law (also) on the application of a person who claims, as a party to a case before an ordinary court in the first instance (i.e., not on appeal), that his or her rights were violated by reason of the application

[209] *OGH* 19 December 2002, 6 Ob 108/02d.

[210] See, for example, Georg E Kodek, 'Die Wahrung von Grundrechten durch die Gerichtsbarkeit' (2008) 63 Österreichische Juristen-Zeitung 216, 221 ff. See also Matthias Jestaedt, 'Gleichordnung der Grenzgerichte oder Überordnung des Verfassungsgerichts? Zur Frage einer Übernahme des deutschen "Pyramidenmodells" in Österreich' (2008) 16 Journal für Rechtspolitik 17, 19 ff.

of an unconstitutional law. The review takes place when an appeal is filed against the decision of the lower court (see article 140 para 1 no 1 d) *B-VG*). On the same conditions, the unlawfulness of an ordinance can be challenged by the parties to the civil or criminal proceedings (see article 139 para 1 no 4 *B-VG*). In both cases, certain areas are exempt from contestation (e.g., insolvency proceedings, see sections 57a, 62a *VfGG*). This is generally[211] justified by the fact that the intervention of the Constitutional Court might otherwise delay urgent judicial decisions. Moreover, the law or ordinance may only be challenged if it is directly applicable in the pending case or if its general lawfulness is a preliminary question for the adjudication of the case. An application made by a party must state both this and the effects of the decision of the Constitutional Court on the case pending before the court (section 57 para 2 and 62 para 2 *VfGG*). Although the application for judicial review does not necessarily interrupt the judicial proceedings, only such acts or orders and decisions are admissible until the Constitutional Court has ruled that cannot be influenced by the Court's decision or that do not decide or postpone the final outcome (section 57a para 6, section 62a para 6 *VfGG*). First experiences have shown that the Constitutional Court's power of judicial review has been considerably enhanced by the new procedure because parties to judicial proceedings no longer depend on the submission of an application by the ordinary court.

There is a significant exception to the principle that decisions of the Supreme Court and the Administrative Court are not subject to any review by the Constitutional Court, namely, in the area of conflicts of jurisdiction (article 138 *B-VG*): under the terms of article 138(1)(2) *B-VG*, the Constitutional Court is called upon to resolve conflicts of jurisdiction between the ordinary courts, the lower administrative courts, and the Administrative Court and the Constitutional Court itself. If acts of the Supreme Court or the Administrative Court conflict with its decision, these are to be set aside by the Constitutional Court.[212]

Another modification of the fundamental parity and separation of constitutional jurisdiction, administrative jurisdiction, and ordinary jurisdiction resides in the courts' rights to file an application to the Constitutional Court to assert the unlawfulness of a general legal act (pursuant to article 89 para 2 *B-VG* for the ordinary courts and article 135 para 4 in conjunction with article 89 *B-VG* for the lower administrative courts and the Administrative Court).[213] The term 'right to apply' must not be misunderstood: if courts with a right to apply have doubts about the conformity of general laws or ordinances with higher-ranking law, they are formally obliged by the Constitution to contest these before the Constitutional Court.[214]

[211] The Constitutional Court declared some of these exemptions from its jurisdiction unconstitutional (see, e.g., *VfSlg.* 20.008/2015).

[212] Cf, for example, *VfSlg.* 14.176/1995 (quashing a decision by the *OGH*); *VfSlg.* 18.191/2007, 18.504/2008 (quashing a decision by the Administrative Court).

[213] See also art 139 para 1 no 5 *B-VG* for the Ombudsman.

[214] Cf Christoph Grabenwarter and Michael Holoubek, *Verfassungsrecht – Allgemeines Verwaltungsrecht* (3rd edn, Facultas, Vienna, 2016) 283 ff.

3. Compliance with the Decisions of the Constitutional Court on the Part of Courts and Administrative Authorities

Courts and administrative authorities comply with the decisions of the Constitutional Court almost without exception. One of the rare exceptions in which compliance was refused was the 'Carinthian place-name sign dispute': in 2001, the Constitutional Court struck down the 'town-sign provision' in the *Volksgruppengesetz* (Ethnic Group Law), which limited bilingual topographical designations to areas where non-German speakers made up more than 25 per cent of the entire population, on the grounds that it contravened the 1955 State Treaty of Vienna.[215] Carinthian politicians refused to implement this decision and numerous follow-up decisions. The conflict was only settled ten years later, when the Austrian parliament passed a new Ethnic Groups Law with constitutional status.

E. Evaluation

1. The Public Perception of the Constitutional Court

In recent years, decisions of the Constitutional Court have increasingly attracted public attention.[216] This development has been significantly reinforced by the mass media. Since around 2000, the Constitutional Court has been conducting targeted media work by employing, on a full time basis, a press spokesperson. The president regularly gives interviews in daily and weekly newspapers, but also on television and radio. The other Justices are only occasionally the subject of media coverage, e.g., when they emerge as rapporteurs during oral proceedings or make statements at academic conferences that attract public attention.

In the past, there has been some criticism of the media activity of the Constitutional Court and of individual statements by its president. By and large, media response to the decisions of the Constitutional Court is very positive. This is partly because the Constitutional Court has traditionally been perceived as a non-partisan body in which the media and citizens generally have always placed great trust.[217] In a 'trust index' prepared in March 2012 by a leading polling institute, the Constitutional Court ranked fourth in the category 'trust in institutions', only ranking behind the Chamber of Labour (*Arbeiterkammer*, a statutory body representing the interests of employees), the Federal Court of Audit (*Bundesrechnungshof*), and the police.[218] Moreover, the fact that the Constitutional Court, in spectacular proceedings on questions of fundamental law, in effect puts the state and sometimes even the European Union in their place gives the impression that the Court provides effective protection for citizens and their

[215] *VfSlg.* 16.404/2001.

[216] See also Theo Öhlinger, 'Die Verfassungsgerichtsbarkeit in Österreich – Der Wandel von Funktion und Methode in einer neunzigjährigen Geschichte', in Michael Wrase and Christian Boulanger (eds), *Die Politik des Verfassungsrechts: Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten* (Nomos, Baden-Baden, 2013) 243, 254 ff.

[217] Cf René Marcic, *Verfassung und Verfassungsgericht* (Springer, Vienna, 1963) 211.

[218] Cf the APA/OGM 'Vertrauensindex – Institutionen' (Confidence Index – Institutions) (2011) 4 https://www.ogm.at/2012/03/apaogm-vertrauensindex-institutionen/ (last accessed 29 June 2018).

rights. This became particularly clear in the judicial-review procedure on data retention, which was passed into law as part of the implementation of an EU directive. In this case, the Constitutional Court, through a preliminary ruling under Article 267 TFEU, made the ECJ set aside the directive and subsequently struck down the implementation provisions enacted by the Austrian parliament.[219]

2. The Reception of Constitutional Adjudication by Legal Scholars

Constitutional adjudication has always heavily influenced legal scholarship. It is the centre of attention in university teaching as well as in the programmes of academic conferences. Important dissertations, habilitation theses, and numerous monographs deal exclusively or predominantly with constitutional adjudication and its decisions on important sections of public law. Significant journals have to different extents devoted sections specifically to the decisions of the Constitutional Court—from regular pronouncements with or without glosses[220] to reports on judgments with more or less analytical commentaries[221] and 'major' articles devoted to a particular decision.[222]

The discussion among Austrian public-law scholars is characterized by certain peculiarities—especially in comparison with constitutional jurisprudence in Germany—that are significant for the role and perspective of the Constitutional Court. These peculiarities include the methodological–theoretical bent, which is a result of the above-mentioned 'hierarchical structure' theory, the great significance of historical and textual interpretation, and the comparatively low importance of purposive ('teleological') interpretation.[223] These characteristic features also determine how the Constitutional Court and its decisions are received.

It was precisely the theory of a 'hierarchical structure' and the associated tendency towards a formal, non-political positivism of the law in continuation of the ideology-critical approach of the theory of pure law ('*Reine Rechtslehre*') that were formative in the first period of the B-VG—for the basic methodological understanding of scholars as well as in the Constitutional Court itself.[224] The Association of German Constitutional Law Scholars held its annual conference in Vienna for the first time on the eve of the massive political interference with the independence of

[219] See, for example, *VfSlg.* 19.892/2014.

[220] E.g., in the *Juristische Blätter* or the *Österreichische Juristenzeitung.*

[221] We should particularly note the decades-long annual chronicle of constitutional judgments in the *Juristische Blätter* under the title 'Lebendiges Verfassungsrecht', begun by Theodor Spanner (1959–1989) and continued by Richard Novak (1990–2000) and Walter Berka (2009–2014). See also the series of articles by Heinrich Neisser, Gernot Schantl, and Manfried Welan, 'Betrachtungen zur Judikatur des Verfassungsgerichtshofs', in 22–9 *Österreichische Juristenzeitung* (1967–1974). But practice-oriented journals also contain regular articles on court rulings (e.g., the survey initiated by Michael Holoubek and Michael Lang in the journal *ecolex* in 1990).

[222] See, for example, Stefan Griller, 'Verfassungswidrige Schrottlenkung' (1985) 12 Österreichische Zeitschrift für Wirtschaftsrecht 65 ff (on the so-called scrap apportionment judgment in *VfSlg.* 10.179/1984).

[223] Ewald Wiederin, 'Verfassungsinterpretation in Österreich', in Georg Lienbacher (ed), *Verfassungsgerichtsbarkeit in Europa. Heinz Schäffer Gedächtnissymposion* (Jan Sramek Verlag, Vienna, 2011) 81, 82 ff.

[224] For details, see Alexander Somek, 'Wissenschaft vom Verfassungsrecht: Österreich' (n 202) 649 ff.

the Constitutional Court; the annual conference of 1928 was devoted to the topic of the 'Nature and Development of Constitutional Jurisdiction'. In addition to Heinrich Triepel, another speaker at the conference was the host, Hans Kelsen.[225] Kelsen's address was an apologia for the Austrian model of the constitutional court. It was dressed in abstract, partly theory-based, partly policy-based considerations. Basic characteristics of Austrian constitutional adjudication and its theoretical foundations in the doctrine of the 'hierarchical structure' of the legal order were thus introduced into the discourse of the Association of Constitutional Law Teachers. In this sense, the Vienna conference, with all due caution in the attribution of influences in this period of political upheavals, can also be said to have had a certain significance for the establishment of the German *Bundesverfassungsgericht* (Federal Constitutional Court) after the Second World War.[226] Incidentally, the only Austrian contributor to the debate apart from the host was Adolf J Merkl, who naturally agreed with the theoretical premises of his academic teacher but also raised policy demands. Some of these were realized shortly after, such as the tightening of the incompatibility provisions for Justices. Others came into fruition decades later, such as a broader access to judicial review.[227] The script of Kelsen's address has been repeatedly reprinted and translated into the French, Portuguese, and Spanish.[228] Not least, his contribution ushered in a literary debate with Carl Schmitt, who vehemently rejected the concept of any court with the power to decide on constitutional issues.[229] This debate commands attention to this day.[230]

Constitutional adjudication was thrown right back to the beginning, indeed suppressed altogether, by the political developments off 1933 to 1945, which resulted in dictatorship. In 1945, the tradition of the First Republic was taken up once more. As late as 1950, Ludwig Adamovich Sen, the first president of the Constitutional Court[231] after 1945 and professor of public law, wrote that the Constitutional Court only had the power to decide on the basis of current constitutional law and had no competence to 'adduce any legal considerations, no matter from what source'.[232] While constitutional adjudication hardly created any impulses starting from this basic position after 1945, law-and-state scholars paved the way for a departure from formalist constitutional thinking in the 1960s and 1970s. The works of constitutional academics

[225] (1928) 5 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 2 ff, 30 ff.

[226] Thus Thomas Olechowski, Tamara Ehs, and Staudigl-Ciechowicz, *Die Wiener Rechts- und Staatswissenschaftliche Fakultät 1918–1938* (Vandenhoeck & Ruprecht unipress, Göttingen, 2014) 495.

[227] Adolf J Merkl, 'Diskussionsbeitrag' (1928) 5 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 97 ff.

[228] Thomas Olechowski, 'Hans Kelsen als Mitglied der Deutschen Staatsrechtslehrervereinigung', in Matthias Jestaedt (ed), *Hans Kelsen und die deutsche Staatsrechtslehre* (Mohr Siebeck, Tübingen, 2013) 11, 16.

[229] Carl Schmitt, *Der Hüter der Verfassung* (first published 1931, 5th edn, Duncker & Humblot, Berlin 2016) (extended edition of Carl Schmitt, 'Der Hüter der Verfassung' [1929] 16 Archiv des öffentlichen Rechts N.F. 161); Hans Kelsen, 'Wer soll Hüter der Verfassung sein?' (1930/31) VI Die Justiz 576.

[230] See, for example, Thomas Olechowski, 'The beginnings of constitutional justice in Europe', in Mikael Rask Madsen and Chris Thornhill (eds), *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law* (CUP, Cambridge, 2014) 77, 88 ff.

[231] On the basis of the *B-VG*.

[232] Ludwig Adamovich, 'Probleme der Verfassungsgerichtsbarkeit' (1950) 72 Juristische Blätter 73, 74.

who taught in Innsbruck or at least had started their careers there bear particular mention. Günther Winkler and Felix Ermacora, for example, published works that were to become influential in the development of constitutional law and the rulings of the Constitutional Court. Winkler's *Wertbetrachtung*,[233] which was published in 1969, influenced a whole generation of post-war constitutional lawyers in various professional capacities—at universities, in the public administration, and not least at the Constitutional Court.[234]

In 1970, Felix Ermacora published a two-volume *Allgemeine Staatslehre* (General Theory of Law and State)[235] and thus took up a discipline in which there had been no Austrian representative since 1945. Winkler and Ermacora had been pupils of the long-time president of the Constitutional Court, Walter Antoniolli,[236] and for years held seminars with him; like him, they soon continued their academic careers at the faculty of law in Vienna. This is a visible indication that there were intensive interactions between academia and the Constitutional Court in the period after 1950 that are not documented in detail but are known to contemporaries from conversations. In addition, the long-standing Innsbruck professors Peter Pernthaler and Norbert Wimmer, themselves pupils of Felix Ermacora, were co-founders of a 'material understanding of the constitution'.[237] Pernthaler's three-volume work on planning law had some influence on the methodological orientation of constitutional law.[238] The rulings of the Constitutional Court first showed they were departing from the formalist view in the area of the principle of the rule of law[239] and later in the field of human rights, starting with the principle of equality and the guarantee of property rights.[240] Alongside the developments in constitutional jurisprudence, the 1970s saw the first effects of the influence of the European Convention on Human Rights and the rulings of the ECtHR on Austrian constitutional adjudication, which enhanced a material understanding of the constitution, especially with regard to human rights.

[233] Günther Winkler, *Wertbetrachtung im Recht und ihre Grenzen* (Springer, Vienna, 1969).

[234] See, for example, Karl Korinek, 'Zur Interpretation von Verfassungsrecht', in Heinz Mayer and others (eds), *Staatsrecht in Theorie und Praxis: Festschrift Robert Walter* (Manz, Vienna, 1991) 363.

[235] Felix Ermacora, *Allgemeine Staatslehre: Vom Nationalstaat zum Weltstaat* (2 vols, Duncker & Humblot, Berlin, 1970).

[236] Walter Antoniolli was president for nearly two decades, namely, from the beginning of 1958 to the autumn of 1977; he had previously been a member of the Court and then vice-president. On his biography, Karl Korinek, 'Walter Antoniolli (1907–2006)', in Peter Häberle, Michael Kilian, and Heinrich Wolff (eds), *Staatsrechtslehrer des 20. Jahrhunderts: Deutschland – Österreich – Schweiz* (De Gruyter, Berlin, 2015) 735.

[237] Thus the title of Wimmer's habilitation dissertation: Norbert Wimmer, *Materiales Verfassungsverständnis. Ein Beitrag zur Theorie der Verfassungsinterpretation* (Springer, Vienna, 1971).

[238] Peter Pernthaler, *Raumordnung und Verfassung. Band 1: Raumplanung als Funktion und Schranke der Gebietshoheit* (Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Vienna, 1975); *ibid, Raumordnung und Verfassung. Band 2: Raumordnung, demokratischer Prozeß und Rechtsschutz* (Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Vienna, 1978); *Raumordnung und Verfassung. Band 3: Neuere Entwicklungen* (Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Vienna, 1990).

[239] For an early example, see *VfSlg.* 3130/1956 on the minimum standard of comprehensibility in the wording of laws and ordinances and on the admissibility of references to other sources.

[240] Cf, for example, the increasing demands on the lawfulness of compulsory purchases beginning with *Vfslg.* 3666/1959 (in contrast to *VfSlg.* 1123/1928).

The 1980s saw the start of a new phase of constitutional adjudication and its perception in academia. Within a few years, four professors and a practicing lawyer of approximately the same age were appointed to the Constitutional Court. They were to have a decisive influence on its rulings for three decades.[241] In 1980, the Constitutional Law Teachers' Conference, held in Innsbruck, devoted its first discussion to the topic of 'Constitutional Adjudication in the Structure of State Functions'. The first speaker was the Austrian Justice Karl Korinek. After noting differences in the way the Constitutional Court and the German *Bundesverfassungsgericht* understood their roles and methods, Korinek went on to note the great reticence on the part of the Constitutional Court on issues of human rights. Detailing initial approaches to a substantive interpretation of human rights in academia and Winkler's 'Wertbetrachtung' in particular, Korinek demanded that the values contained in the Constitution be specified more closely. The Constitutional Court does not set forth a specific solution for the legislature to enact but rather sets limits to what it can enact; this is the remit of constitutional interpretation. 'In our constitutional system, the task of constitutional interpretation is ultimately delegated to the Constitutional Court, which on its own account and conclusively is called upon to draw the line between the binding heteronomous determinants and the autonomous determinants that ensure the freedom to act [for the legislator].'[242] In this quote, the 'hierarchical structure' theory appears prominently once again as formulated by Adolf J Merkl, and the role of the final decision of the Constitutional Court is emphasized. The term 'borderline institution' (*Grenzorgan*), which designates a body whose task is not to protect the federal statutes but to render the final decision, has become a standard figure in Austrian constitutional law.[243]

A few years later, a change of direction in the rulings on the freedom of occupation occurred as a result of various influences from ECtHR decisions on the interpretation of fundamental rights[244] and from the preliminary work of professors who later became involved in the case-law themselves;[245] the case in question involved access to the market for the processing of scrap iron. The Court derived substantive limitations of proportionality from what had been until then in essence a merely formal

[241] Karl Spielbüchler, member from 1976 to 2009; Karl Korinek, member from 1978 to 2008, the last five years as president; Kurt Heller, member from 1979 to 2009; Peter Oberndorfer, substitute member from 1984, member from 1987 to 2012. Siegbert Morscher, member from 1988 to 2005. Peter Jann, who was a member as of 1978 but became an ECJ judge in 1995, is not included.

[242] Karl Korinek, 'Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen' (1981) 39 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 7, 45.

[243] The term *Grenzorgan* was developed in the theory of international law and can be found for the first time in Alfred Verdross, *Völkerrecht* (2nd edn, Springer, Vienna, 1950) 25. Today, the term is used generally as a characterization of international and national supreme courts (cf, e.g., Matthias Jestaedt, 'Wirken und Wirkungen höchstrichterlicher Judikatur – Rechtsprechung von Grenzorganen aus Sicht der Reinen Rechtslehre', in Clemens Jabloner (ed), *Wirken und Wirkungen höchstrichterlicher Judikatur: Symposion zum 60. Geburtstag von Heinz Mayer* (Manz, Vienna, 2007) 9.

[244] Walter Berka, 'Die Europäische Menschenrechtskonvention und die österreichische Grundrechtstradition' (n 158) *passim*.

[245] Peter Oberndorfer and Bruno Binder, 'Der verfassungsrechtliche Schutz freier beruflicher, insbesondere gewerblicher Betätigung', in Ludwig Adamovich and Peter Pernthaler (eds), *Auf dem Weg zur Menschenwürde und Gerechtigkeit, Festschrift für Hans R. Klecatsky* (Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Vienna, 1980) 677 ff; Karl Korinek, 'Das Grundrecht der Freiheit

legal proviso.[246] This ruling was soon extended to all areas of public commercial law and influenced the interpretation of other fundamental rights, in particular the guarantee of property and the principle of equality. In a next step, considerations of objectivity were transferred from the principle of equal treatment to individual areas of the law of constitutional structure. Under this influence and in the wake of the increasing importance of rulings from Strasbourg, which with a few exceptions were accepted and reinforced by the Constitutional Court, scholars increasingly turned to more fundamental issues, an endeavour whose choice of topics was guided by the rulings of the Court.[247] The academic literature in constitutional law became more case-law-oriented. Certain series and collections of articles also contributed to this. In addition to monographs, which were mainly devoted to an exegesis of the decision, a prime example can be found in the series of articles in the *Europäische Grundrechte-Zeitschrift* on fundamental rights in Austria, which was summarized and continued in the 1990s in a three-volume anthology.[248] One might also mention a collection published by Felix Ermacora and two of his pupils[249] as well as the volume dedicated to Austria, now in its second edition, in the German *Handbuch der Grundrechte* edited by Detlef Merten and Hans-Jürgen Papier.[250] The investigation and analysis of the judgments of the Constitutional Court were further reinforced by the fact that the literary genre of the legal commentary now extended to constitutional law. As of 1994, a short commentary was published in five editions[251] that, especially in the area of fundamental rights, reproduced the judgments largely without comment. At the turn of the millennium, however, two multivolume large-scale commentaries on constitutional law were finally launched at almost the same time; they present and analyse the judgments meticulously.[252] Few jurists writing on Austrian constitutional law have been able to avoid working on one of these two commentaries.

The case-law orientation is linked to a further orientation, namely, the Europeanization of constitutional law. The Strasbourg judgments have always been part of the standard repertoire of most constitutional lawyers, given the constitutional status of the ECHR, but since Austria's accession to the European Union, EU constitutional law, and, with it, the judgments of the ECJ have rapidly gained a firm place in constitutional analyses. Case-law-oriented thinking, guided by important decisions of

der Erwerbsbetätigung als Schranke für die Wirtschaftslenkung', in Karl Korinek (ed), *Beiträge zum Wirtschaftsrecht: Festschrift für Karl Wenger zum 60. Geburtstag* (Orac, Vienna, 1983) 243 ff.

[246] *VfSlg.* 10.179/1984; see Stefan Griller, 'Verfassungswidrige Schrottlenkung' (n 222) 65.

[247] Cf Ewald Wiederin, 'Verfassungsinterpretation in Österreich' (n 223) 98.

[248] Rudolf Machacek, Willibald Pahr, and Gerhard Stadler (eds), *Grund- und Menschenrechte in Österreich* (3 vols, NP Engel Verlag, Kehl am Rhein, 1991–1997).

[249] Felix Ermacora, Manfred Nowak, and Hannes Tretter (eds), *Die Europäische Menschenrechtskonvention* (Wilhelm Braumüller Universitäts-Verlagsbuchhandlung, Vienna, 1983).

[250] Detlef Merten, Hans-Jürgen Papier, and Gabriele Kucsko-Stadlmayer (eds), *Handbuch der Grundrechte in Deutschland und Europa: Grundrechte in Österreich* (vol VII/1, 2nd edn, Manz, Vienna, 2014).

[251] Heinz Mayer and Gerhard Muzak, *B-VG. Das österreichische Bundes-Verfassungsrecht* (5th edn, Manz, Vienna, 2015).

[252] Karl Korinek and others (eds), *Österreichisches Bundesverfassungsrecht* (Verlag Österreich, Vienna, 1999); Benjamin Kneihs and Georg Lienbacher (eds), *Rill-Schäffer-Kommentar Bundesverfassungsrecht* (Verlag Österreich, Vienna, 2001).

the Constitutional Court but also of the European courts, is increasing. However, the judgments of the Constitutional Court receive the most attention, apart from those decisions of the European courts that directly affect Austria.

Overall, the judgments of the Constitutional Court enjoy a high reputation not only among the general public but also in specialist circles.[253] Alongside signs of public veneration[254] and predominantly positive comments on the rulings, there remains a degree of criticism, however, which is sometimes vehemently expressed. In the past, however, this criticism always resulted in constructive technical debates, which not infrequently had repercussions on judgments. Mutual influence is favoured by the close personal connection between academia and the Constitutional Court in a country of comparatively small size. In the last twenty-five years, on average, one third of the members of the Constitutional Court have been professors; they have come from all six Austrian universities with law faculties. What is equally important is that the Justices' academic assistants (also known in the jargon as 'recording clerks', given their former, more prominent activity) are increasingly former assistants at university institutes. After a two- to five-year stint at the Court, they either return to the university or switch to professional positions in the federal or *Land* administrations or at the Court of Auditors. There they continue to be concerned with the judgments of the Constitutional Court. In addition to their 'day job', they sometimes publish in specialist journals, commentaries, or collections. Also among the practising lawyers specializing in public law are some former employees of the Constitutional Court. This not inconsiderable number of lawyers involved in the legal discourse often have an unspoken loyalty to the Constitutional Court as an institution for which they worked for at a young age.

It is not common for Justices to publish scholarly pieces on decisions in which they have been involved. However, the Justices, especially the professors, are often active as speakers at specialist academic events, where they use the judgments as a starting point for more general considerations or use the event to inform colleagues about the judgments. Some of the Justices also contribute to the dissemination of Constitutional Court rulings by organizing and directing seminars at universities, some of which are also attended by a non-student audience.

3. The Role and Self-Understanding Within the European Legal Space

The Constitutional Court perceives itself as a contributor to a European constitutional community whose responsibility lies in fulfilling its original role as 'guardian' of the Austrian federal constitution. In addition, the Constitutional Court, in concert with

[253] See Theo Öhlinger, 'Die Verfassungsgerichtsbarkeit in Österreich – Der Wandel von Funktion und Methode in einer neunzigjährigen Geschichte' (n 216) 253.

[254] Thus, in 1995 Günther Winkler dedicated a summary of fundamental doctrinal works published under the title *Studien zum Verfassungsrecht* (Springer, Vienna, 1995) to the 'Constitutional Court for Constitution Day 1991'; similarly Peter Pernthaler, *Der Verfassungskern. Gesamtänderung und Durchbrechung der Verfassung im Lichte der Theorie, Rechtsprechung und europäischen Verfassungskultur* (Manz, Vienna, 1998).

other constitutional courts, helps to shape the relationship between the development of European standards and national discretion under the European Convention on Human Rights (ECHR) and to coordinate judicial review by the ECJ on the one hand and national courts on the other.

a) Influences of the European Convention on Human Rights

More than most countries in Europe, Austria studies the ECHR and the judgments of the ECtHR intensively.[255] This circumstance is due to the fact that the ECHR, as part of Austrian constitutional law, is a direct benchmark for the Constitutional Court. But even beyond this constitutional status, there is a high degree of willingness on the part of the Constitutional Court to take the judgments of the ECtHR into account to the greatest possible extent.

The effects of the fundamental rights laid down in the ECHR and its additional protocols are by nature far-reaching. In Austria, both have the status of formal constitutional law and can thus be asserted before the Constitutional Court as 'constitutionally guaranteed rights' in the procedure under article 144 para 1 *B-VG*. That the Constitutional Court increasingly bases its judgments on the fundamental rights laid down in the ECHR[256] testifies to the great and increasing importance of the ECHR for the Court's protection of fundamental rights. Likewise, the high citation rate alone shows that the influence of ECtHR judgments on the rulings of the Constitutional Court cannot be overlooked.[257] As a result, tensions that arise in other member states of the Council of Europe as a result of divergences between the judgments of the national constitutional courts and the ECtHR are barely noticeable in Austria. However, there have been some noteworthy divergences lately,[258] e.g., with regard to the right not to be tried or punished twice enshrined in Article 4 Protocol no 7 to the ECHR.[259]

b) The Role Within the European Union

The debate on the law of the European Union (EU) has been going on since Austria's accession to the EU twenty years ago. As an essential difference between Austria and

[255] Cf Christoph Grabenwarter, 'Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes' (2012) 20 Journal für Rechtspolitik 298, 298 ff. See also Walter Berka, 'Die Europäische Menschenrechtskonvention und die österreichische Grundrechtstradition' (n 158) for an older study. For a general analysis, see Wolfram Karl, 'Zur Bedeutung der Entscheidungen des EGMR in der Praxis der österreichischen Höchstgerichte' (2007) 85 Österreichische Richterzeitung 130.

[256] Thus, for example, the Court's older case-law based on art 5 StGG on the question of the duty to pay compensation in the case of expropriations was recently abandoned in favour of a case-law based on art 1 of the First Additional Protocol to the ECHR. For more detail, see Christoph Grabenwarter and Michael Holoubek, *Verfassungsrecht – Allgemeines Verwaltungsrecht* (n 214) 209 ff.

[257] Likewise Ludwig Adamovich, 'Der Verfassungsgerichtshof der Republik Österreich. Geschichte – Gegenwart – Visionen' (n 46) 4.

[258] Cf Christoph Grabenwarter, 'Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes' (n 255).

[259] Cf above all *VfSlg.* 18.833/2009 or *Zolotukhin v Russia* (GC) App No 14939/03 (ECtHR, 10 February 2009) (ECLI:CE:ECHR:2009:0210JUD001493903) (*ne bis in idem*); see also *VfSlg.* 19.587/2011 and *Kugler v Austria* App No 65631/01 (ECtHR, 14 October 2010) (ECLI:CE:ECHR:2010:1014JUD006563101) (oral arguments in the procedure for reviewing ordinances).

Germany, it should be noted that the conflicts between national law and Union law are often not brought before the Constitutional Court. The instrument of a referendum in the event of a substantive change to the federal constitution, which was put to use when the country joined the European Union, meant that the political disputes were not dealt with juridically before the Constitutional Court but at the political level. Although the Constitutional Court often had to deal with applications to annul federal constitutional laws or to determine the unlawfulness of state treaties in connection with Austria's accession to the European Union, these applications have been consistently unsuccessful.[260] The applications often simply failed the admissibility test, because the Constitutional Court—unlike the *Bundesverfassungsgericht* in Germany—regularly denied any direct legal violation by the treaties. Finally, the Constitutional Court has rejected as inadmissible, for want of standing, applications to declare the Treaty of Lisbon unlawful.[261] Unlike its German counterpart, therefore, the Constitutional Court has not commented on the substance of the Treaty of Lisbon.

Union law is in principle neither the subject nor the benchmark of judicial review by the Constitutional Court.[262] The violation of provisions of EU law in administrative (court) proceedings is equivalent to a breach of sub-constitutional law and therefore a matter for the Administrative Court. In the field of application of EU law, the principle of the 'dual conditionality' of Austrian law is applied, i.e., Austrian institutions are bound both by EU law and by (Austrian) constitutional law when implementing EU law or its enshrinement in national law. As far as the Constitution is directly involved, the authority to review the constitutionality of ordinances lies with the Constitutional Court. In any event, the dual link applies if EU law grants states leeway in implementing or applying it.

Today, this is not altogether true of the fundamental rights contained in the EU Charter of Fundamental Rights (CFR).[263] Since a landmark ruling in 2012, the Constitutional Court has assumed that the rights recognized by the CFR are, under certain conditions, equivalent to constitutionally guaranteed rights. The Constitutional Court now assumes—following the principle of equivalence in EU law—that rights conferred by the CFR can also be asserted as constitutionally guaranteed rights and—if the CFR is applicable in the relevant proceedings—constitute a standard of review for general legal provisions. However, the principle of equivalence alone does not require this.[264] According to the Constitutional Court, the Charter serves as a standard of review 'at least if the relevant guarantee contained in the Charter of Fundamental Rights, in its wording and precision, matches

[260] See, for example, *VfSlg.* 18.740/2009.

[261] *VfSlg.* 19.085/2010, 19.170/2010.

[262] E.g., Theo Öhlinger and Michael Potacs, *EU-Recht und staatliches Recht. Die Anwendung des Europarechts im innerstaatlichen Bereich* (5th edn, LexisNexis, Vienna, 2014) 168 ff.

[263] See, for example, Christoph Grabenwarter, 'Verfassungsrecht, Völkerrecht und Unionsrecht als Grundrechtsquellen', in Detlef Merten, Hans-Jürgen Papier, and Gabriele Kucsko-Stadlmayer, *Handbuch der Grundrechte* (n 250) 64 ff.

[264] Appositely Michael Potacs, 'Glosse zu VfGH 14.3.2012, U 466/11' (2012) 134 Juristische Blätter 503, 510; Michael Potacs, 'Das Erkenntnis des VfGH zur Grundrechte-Charta und seine Konsequenzen', in Gerhard Baumgartner (eds), *Jahrbuch Öffentliches Recht 2013* (Neuer Wissenschaftlicher Verlag, Vienna, 2013) 11, 14 ff.

constitutionally guaranteed rights of the Austrian federal constitution.'[265] An important argument for the Constitutional Court is the fundamental constitutional decision whereby the Constitutional Court has exclusive jurisdiction, vis-à-vis the other superior courts, to rule on whether constitutionally guaranteed rights have been violated.

The Constitutional Court is guided in its consideration by the idea of the functional equivalence of the CFR and ECHR[266] and has recourse to a peculiarity of the Austrian legal system, that is, the specific legal sources for constitutional law. The Constitutional Court emphasizes that the ECHR is directly applicable constitutional law, but that the CFR duplicates the ECHR in important areas, both in wording and in intent. However, since many of the provisions of the CFR—the 'rights'— have the same function (to the extent EU law applies) as the rights guaranteed by constitutional law, in particular as contained in the ECHR, there are areas of wide overlap. According to the Constitutional Court, it would run counter to the concept of a centralized constitutional jurisdiction established by the Austrian federal constitution if it could not rule on those rights contained in the CFR that have the same content as those of the ECHR.

The prerequisite for the use of the CFR as a test in constitutional proceedings is that it is applicable under its Article 51.[267] In the context of the Court's jurisdiction, it is therefore decisive whether the actions challenged before it, or their legal basis, were taken 'in pursuance of EU law'. To determine this, the Constitutional Court looks to the rulings of the ECJ in the *Siragusa*[268] and *Hernandez*[269] cases and examines whether the purpose of a rule is to implement a provision of EU law, what the character of this rule is, and whether it pursues objectives other than those covered by EU law, even if it may indirectly influence EU law. It is also necessary to examine whether there is a provision under EU law specific to or capable of influencing this area.[270] In accordance with the rulings of the ECJ, the Constitutional Court requires that the provisions of EU law that give rise to this connection contain certain obligations on the part of the Member States with respect to the facts at issue in the original proceedings or the matter under review.[271] Only insofar as EU law creates such a specific obligation for Member States are the legal acts of the latter that apply these obligations translated into an 'implementation of the law of the Union' within the meaning of Article 51(1) CFR.

It has not yet been decided in detail which fundamental rights contained in the Charter are so similar to those of the Austrian federal constitution that they can be asserted as constitutionally guaranteed rights. The guarantees of Articles 1 to 19 and

[265] *VfSlg.* 19.632/2012.

[266] Christoph Grabenwarter, 'Europäische Grundrechte in der Rechtsprechung des Verfassungsgerichtshofes' (n 255) 301.

[267] *VfSlg.* 19.865/2014.

[268] Case C-206/13 *Siragusa* [2014] (ECLI:EU:C:2014:126) para 25.

[269] Case C-198/13 *Hernández* [2014] (ECLI:EU:C:2014:2055) para 37.

[270] *VfSlg. 19.865/2014* with reference to ECJ, C-309/96 *Annibaldi* [1997] ECR I-7493 (ECLI:EU:C:1997:631) paras 21–3; Case C-40/11 *Iida* [2012] (ECLI:EU:C:2012:691) para 79; Case C-87/12 *Ymeraga and Ymeraga-Tafarshiku* [2013] (ECLI:EU:C:2013:291) para 41; C-206/13 *Siragusa* [2014] (ECLI:EU:C:2014:126) para 25.

[271] *VfGH* 3 March 2015, G 107/2013; 5 March 2015, B 533/2013.

47 *et seq* CFR (Titles I, II, and VI) as well as most of the rights of Title V certainly should be included. This also applies if there is no equivalent fundamental right in the ECHR, in the *B-VG*, or in any constitutional provisions, as is the case, for instance, with Article 49(3) CFR, or if the scope of protection is wider, as is the case with Article 47 CFR. However, the scope of such fundamental rights is questionable if, like Article 18 CFR, they guarantee the right of asylum merely 'in accordance with' the Geneva Refugee Convention. The guarantees in Titles III and IV of the Charter (equality and solidarity) are in part also to be regarded as constitutional rights in the sense described, such as Article 24 (right of the child) and Article 29 (right to access to an employment agency). Furthermore, rights guaranteed under 'national practices' are to be seen as equal to these rights, although the scope for legislation and enforcement may be greater. Future rulings will have the opportunity to specify which guarantees have such a 'different normative structure' that they are not constitutionally guaranteed rights and therefore do not constitute a standard of review for cases before the Constitutional Court. The Court expressly mentions the principles set forth in Articles 22 and 37 CFR.[272]

From a procedural point of view, it should be emphasized that the Austrian Constitutional Court was prepared at an early stage to seek ECJ rulings by way of the preliminary ruling procedure.[273] Compared to other European constitutional courts, this characterizes it as a constitutional court ready to cooperate with the ECJ. Nevertheless, requests for a preliminary ruling are not very frequent in practice. The main reason for this is that EU law, save for the fundamental rights the CFR grants, does not constitute a standard of review for the Constitutional Court. The Court has no jurisdiction to review general national legal acts on the basis of EU law because the possible incompatibility of such acts with provisions of EU law is not an 'unlawful' within the meaning of article 139 *B-VG* and not 'unconstitutional' within the meaning of article 140 *B-VG*; therefore, problems of compatibility are sometimes resolved through an interpretation that complies with Union law or through the primacy-of-application principle.[274] If a lower administrative court has not referred a substantial question of interpretation regarding EU law to the ECJ for a preliminary ruling, even though it is required to do so under Article 267(3) TFEU, the Constitutional Court annuls the lower administrative court ruling on the grounds that it breaches the right to have the case heard before the proper judge. New potential for requests for preliminary rulings exists in the area of fundamental rights, given the Court's new rulings on the equivalency of the CFR with constitutional rights,[275] provided the interpretation of the CFR or the compatibility of secondary law with the CFR is at issue.

[272] *VfSlg.* 19.632/2012.

[273] *VfSlg.* 15.450/1999, 16.050/2000, 16.100/2001; most recently *VfSlg.* 19.702/2012 (retention of data). The Constitutional Court has also repeatedly admitted the priority of application of Union law vis-à-vis national constitutional law; see, e.g., *VfSlg.* 15.427/1999. Cf also Christoph Grabenwarter, 'Staatliches Unionsverfassungsrecht', in Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht* (2nd edn, Springer, Berlin, 2009) 123 ff.

[274] *VfSlg.* 16.628/2002.

[275] *VfSlg.* 19.632/2012.

c) Conclusion

In conclusion, the Austrian Constitutional Court is a court that is open to European developments in general as well as to concrete decisions of the Strasbourg and Luxemburg Courts. It has proven that it does not automatically take every decision for granted. It has notably made corrections and adaptions where it found that a decision of the Strasbourg Court did not fit with the case-law of the ECtHR itself or was in conflict with the long-standing jurisprudence of the Constitutional Court. Moreover, the Constitutional Court uses its margin of appreciation with a view to the ECHR as well as to the fundamental rights of the CFR. In doing so, the Constitutional Court aims at developing, in cooperation with other constitutional courts and the European courts, a common ground for a high standard of European human rights.